

License To Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program

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INTRODUCTION

Since its inception in the late 1970s, China's family-planning campaign has included such harsh measures as forced abortion and sterilization. The campaign has also exacerbated social practices such as female infanticide and the abandonment of infant girls. These measures and practices have been criticized for violating international conventions on the rights of women and female children.¹ The Chinese government has categorically denied responsibility for the violations, which it claims are either the vestiges of "backwards" traditions or isolated incidents committed by zealous local officials. In any case, such practices are said to be rare and "by no means represent the mainstream of overall efforts."²

In this paper, I examine this denial of government responsibility. The government of China, in its zeal to achieve reduction in the nation's average birth rate,³ is complicit in the violence against women and female children. The government's failure to address these violations is in part due to the supremacy of Communist Party directives over codified laws. According to the Chinese Constitution, Communist Party directives stand above both legislative and judicial process, and supersede the laws that purport to protect women and female children. In Part I, I reconstruct the top-down process by which China's national family-planning policy was adopted and implemented in a manner subject to neither legislative review nor existing legal restrictions. I explain how this policy pressures local officials to meet centrally-dictated quotas at great cost to women, and how and why government officials and the police forcibly detain women for abortions or sterilizations, beat those who resist, confiscate their property, and demolish their houses. In most cases, it is no one but government family-planning officials working toward their birth quotas who terrorize women and their families into submission.

In Part II, I examine how the government endorses violence against women and female infants by either authorizing coercive measures or failing to prosecute local officials who violate women's legal rights. I explain how other

1. Documenting the exact scale of the use of violence against women and infant girls is difficult due to controls on information concerning this sensitive matter, but available information, some of which will be used in the following analysis, suggests it is prevalent and routine. For case documentation of the use of violence in China's family-planning campaign, see HUMAN RIGHTS IN CHINA, CAUGHT BETWEEN TRADITION AND THE STATE: VIOLATIONS OF THE HUMAN RIGHTS OF CHINESE WOMEN 32-59 (1995) [hereinafter CAUGHT BETWEEN TRADITION AND THE STATE]; and AMNESTY INTERNATIONAL, WOMEN IN CHINA: IMPRISONED AND ABUSED FOR DISSENT 1 (1995) [hereinafter WOMEN IN CHINA].

2. See Wang Xin, *Population vs. Development: Challenge of the New Century*, BEIJING REV., May 1-7, 1995, at 15 [hereinafter *Population vs. Development*].

3. Official statistics indicate that China reduced its population growth rate from 25.83 per thousand in 1970 to 11.45 per thousand in 1993. *Id.* at 12. The average Chinese family size has fallen by about 60% in the past two decades and women have, on average, between two and three children. Shanti R. Conly & Sharon L. Camp, *China's Family Planning Program: Challenging the Myths*, 1 COUNTRY STUDY SERIES, at 1 (1992).

government policies exacerbate the need for coercive enforcement of birth-control policies. These other policies create economic and social incentives for families to resist government quotas and restrictions, while simultaneously erecting obstacles for women seeking protection from coerced compliance.

In recent years China has, for the first time, become a signatory to various international human rights declarations on reproductive rights and the rights of women and children. In Part III, I examine the international norms that China has promised to respect, and demonstrate how the family-planning policy and practices violate these norms. I argue that if China is to honor its commitments and comply with international human rights standards, it must readjust its policy, abandon parts of it, and halt certain practices. In Part IV, I explore policy alternatives.

I. THE POLICY AND ITS TOOLS

A. *One Birth per Couple: A National Priority*

In the early 1950s, Party Chairman Mao Zedong joined the Soviets in rejecting Malthusian demographic determinism,⁴ and advocated enlarging the population for ideological reasons. China instituted a population policy that encouraged women to give birth to more children. The policy slogan was: "The more babies the more glorious are their mothers." The famine in the early 1960s and the severe economic hardships of the late 60s and early 70s, however, shattered the optimistic growth ideology. By the early 1970s, the government had a new slogan: "Later, farther apart, and fewer" [*wan, xi, shao*]. The government urged urban and rural couples to limit the number of children they had to two and three, respectively.⁵

When Communist Party leader Deng Xiaoping started his drive for economic reform, China felt its "population crisis" more acutely. In order to proceed with Deng's "socialist modernization," which stressed economic efficiency, the Party made a national priority of lowering the birth rate drastically and quickly. In 1979, Deng announced that official policy would promote the norm of the one-child family.⁶ The population reduction policy was set out in a series of Communist Party Committee and State Council resolutions and directives, provincial regulations and, more recently, national legislation.

4. Malthus anticipated disastrous overpopulation, and vigorously advocated measures to slow population growth. See Amartya Sen, *Population: Delusion and Reality*, N.Y. REV. OF BOOKS, Sept. 22, 1994, at 62.

5. For a general historical overview of Communist Party family-planning policies, see PENNY KANE, *THE SECOND BILLION: POPULATION AND FAMILY PLANNING IN CHINA* (1987).

6. STEVEN W. MOSHER, *A MOTHER'S ORDEAL* at vii (1993); Conly & Camp, *supra* note 3, at 8.

In 1980, the Central Party Committee called for limiting each couple to one birth.⁷ The stated purpose of this policy was to mobilize the people to control population quantity and improve its quality.⁸ The Central Party Committee and the State Council announced that "controlling population growth is an important strategic issue facing our country's modern socialist construction."⁹ The 1982 Constitution of the People's Republic of China stipulated that the entire country should promote family planning,¹⁰ and made it a duty of all couples to practice birth control.¹¹ The 1980 Marriage Law also made "family planning" an obligation of couples.¹² The Marriage Law forbids marriage before the age of twenty-two for males and twenty for females, calling for "late marriage and late birth" (*wan hun wan yu*).¹³

With this objective set, the central government¹⁴ had to adjust its policies to enhance the prospects for successful implementation. By the early 1980s, a number of factors encouraged additional births within families and led to what the government perceived to be unsatisfactory compliance with the "one birth" policy. These included the dissolution in the late 1970s of the collective "People's Communes," a system of production and political control in rural China, and the granting of more economic freedom to rural families.¹⁵ In early 1982, the central government decided to implement more stringent enforcement measures,¹⁶ some of which remain in effect today. The Central Committee of the Communist Party and the State Council issued a joint directive, ordering the provincial governments to adopt strict methods of policy implementation.¹⁷ A second joint directive issued in 1991, the "Decision on

7. Zhonggong Zhongyang Guowuyuan Guanyu Jinyibu Zuohao Jihua Shengyu Gongzuo Di Zhishi [Directive by the Central Communist Party Committee and the State Council Regarding Further Implementing Family Planning], [hereinafter Joint Directive] (adopted Feb. 9, 1982), ZHONGGUO RENMIN GONGHEGUO FALU FAGUI QUANSHU [THE COMPLETE BOOK OF LAWS AND LEGAL REGULATIONS IN THE P.R.C.] 908.

8. See Guowuyuan Pizhuan Guojia Jihua Shengyu Weiyuanhui Tong Youguan Bumen Zhize Fengong Di Yijian Di Tong Zhi [State Council Endorses the Division of Responsibility Between the State Family Planning Committee and Other Agencies], (adopted July 31, 1981), ZHONGGUO RENMIN GONGHEGUO FALU FAGUI QUANSHU [THE COMPLETE BOOK OF LAWS AND LEGAL REGULATIONS IN THE P.R.C.] 907. Initially, population "quality" did not particularly refer to some biological genetic superiority. Rather, it simply referred to healthier mothers and babies and a higher average standard of living. But later, as discussed below, a more pronounced eugenic program would be introduced to "improve" population "quality."

9. Joint Directive, *supra* note 7, at 908.

10. XIANFA [Constitution] art. 25. (1982) (P.R.C.).

11. *Id.* art. 49.

12. Zhonghua Renmin Gongheguo Hunyinfa [Marriage Law of the P.R.C.] art. 12 (1980), available in LEXIS, Intlaw Library, CHINAL File [hereinafter Marriage Law].

13. *Id.* art. 5.

14. By "central government," I refer to the Central Party Committee, the State Council, and the State Council's ministries. These agencies, particularly the Central Party Committee, are the central decision-making bodies. The National People's Congress normally rubber-stamps their decisions. In recent years, the Party has continued to dominate national government administration, though some separation has appeared at the local level. For the same reason, I use "central government" and "the Chinese state" interchangeably.

15. See discussion *infra* Part II.B.1.

16. See Joint Directive, *supra* note 7, at 908.

17. The Joint Directive, however, gave discretion to provincial governments to allow rural couples with "practical difficulties" to have second births, while forbidding a third birth under any condition. See

Stepping Up Family Planning Work and Strictly Controlling Population Growth," again urged provincial governments to tighten enforcement.¹⁸

According to the rationale that the government has given to justify its policy to the people, population control is the most important step toward a higher standard of living. In the official view, the only alternative to population control is poverty, high infant mortality, and malnutrition.¹⁹ Unbridled population growth, the state warns, retards economic development, depresses the standard of living, keeps infant mortality high, and perpetuates poverty.²⁰ According to this view, compulsory population reduction is an urgent necessity and should be achieved even if the costs to families are high.

B. Legal and Political Status of the Population Policy

In China, Communist Party directives are equivalent or superior to legislation and codified laws. The absolute leadership of the Central Communist Party is one of the four cardinal principles that rules China, according to the 1982 Constitution.²¹ This means that the Party stands above

Joint Directive, *supra* note 7, at 909. This was seen as an attempt to respond to resistance and tension that the policy had provoked, particularly in rural areas in the early 1980s.

18. Zhonggong Zhongyang. Guowuyuan Guanyu Jiaqiaqiang Jihua Shengyu Guong Zuo Yangge Kongzhi Kenkou Zengzhang de Juedeng [Decision on Stepping up Family Planning Work and Strictly Controlling Population Growth], ZHONGHUA RENMIN GONGHEGUO FALU FUGUI QUANSHU [THE COMPLETE BOOK OF LAWS AND LEGAL REGULATIONS IN THE P.R.C.] 911-12 (1991) [hereinafter Decision on Stepping Up Family Planning Work].

19. For example, the State Council's 1991 report on "Human Rights in China," known as the "White Paper," claimed that "China has only two alternatives in handling its population problem: to implement the family planning policy or to allow blind [sic] growth in births. The former choice enables children to be born and grow up healthily [sic] and live a better life, while the latter one leads to unrestrained expansion of population so that the majority of the people will be short of food and clothing, while some will even tend to die young. Which of the two pays more attention to human rights and is more humane? The answer is obvious." INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, HUMAN RIGHTS IN CHINA (1991), reprinted in BEIJING REV., Nov. 4-10, 1991, at 38 [hereinafter 1991 WHITE PAPER]. This statement emphasizes a direct, causal link between population reduction and prosperity. This view was echoed recently in a *Beijing Review* commentary: "Since China adopted a population control policy in the early 1970s, experts believe that 300 million fewer people have been born. . . . Meanwhile, state statistics show that the country's per capita annual income shot up from 235 yuan in 1970 to 2,200 yuan in 1994. This success cannot be separated from effective population control" *Population vs. Development*, *supra* note 2, at 12.

20. However, this correlation does not imply that coercive birth-control measures are the only effective way to combat these problems. Expanding educational and professional opportunities for women, improving basic health and nutrition, providing for security in old age, stimulating economic productivity and, more importantly, distributing social goods fairly, are all effective solutions to these problems. And these steps are eventually more effective in reducing and stabilizing population size. See generally Paul Ehrlich et al., *What It Will Take*, MOTHER JONES, Sept.-Oct. 1995, at 52, 54; Sen, *supra* note 4, at 62. The U.N. General Assembly has also recognized the close relationship between sustainable population and development policies and women's empowerment and expanded opportunities for education and employment. *Report of the International Conference on Population and Development*, U.N. International Conference on Population and Development, at 10, U.N. Doc. A/CONF.171/13 (1994).

21. The preamble to the Constitution of 1982 states that "[u]nder the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship." XIANFA [Constitution] preamble, ¶ 7 (1982). The leadership of the Communist Party, the guidance of Marxism-Leninism and Mao Zedong thought, the preservation of socialism, and the continuation of the proletarian dictatorship are commonly known as the four cardinal principles of the constitution.

legislative and judicial processes. The Party dictates lawmaking; its directives can change existing laws or supersede them, determining whether a particular law is to be enforced. The Central Party Committee has no legal or judicial limits on its powers and it makes policies as it sees fit.²²

In fact, no single, coherent law has ever been enacted to regulate family planning, although regulations applicable to family planning have appeared in other laws. These include the 1980 Marriage Law,²³ the 1992 Law Protecting Women's Rights and Interests (LPWRI),²⁴ and the 1994 Maternal and Infant Health Care Law (MIHCL).²⁵ The most recent effort to enact a national family-planning law, initiated in 1991, was later abandoned. China's population policy was under heavy international criticism at the time, and the national government could not have enacted a family-planning law without inviting international scrutiny.

The making of China's family-planning policy has thus been a top-down process, and its implementation a penetrating one. Through massive social engineering, the policy has demanded restrictions on intimate aspects of individuals' lives.²⁶ Its strategies and objectives, including annual birth quotas for each region, are designed by the central government authorities and delegated to local offices.²⁷ Since the family-planning policy itself has never been codified, it is implemented not according to the rule of law, but rather according to rule by party directives. Government officials are assigned to handle all cases and mete out punishments. Few opportunities are provided for legal representation, hearings, appeals, or judicial review.

22. For an instructive discussion of the roles of law and the constitution in China, see Jerome Alan Cohen, *China's Changing Constitution*, 76 CHINA Q. 794 (1978).

23. Marriage Law, *supra* note 12.

24. Law Protecting Women's Rights and Interests (adopted by the Fifth Annual Session of the Seventh National People's Congress, Apr. 3, 1992), XINHUA Domestic Service, Oct. 27, 1994, available in FBIS-CHI-92-072-S, Apr. 14, 1992, at 29 [hereinafter LPWRI].

25. Law on Maternal, Infant Health Care Reported (adopted Oct. 27, 1994), XINHUA Domestic Service, Oct. 27, 1994, available in FBIS-CHI-94-211, Nov. 1, 1994, at 29 [hereinafter MIHCL].

26. National Report of the People's Republic of China on Population and Development for the International Conference on Population and Development (unpublished report on file with author) [hereinafter P.R.C. Report to Cairo Conference on Population and Development]. The official position on the relation between individual reproductive rights and society's interests is as follows:

[I]n exercising [the right to reproductive freedom], the individuals and couples should take into full account the best interests of the present and future children in their families as well as their obligations and responsibility to society. For countries where the speed of population growth has adversely affected the socio-economic development, the formulation and implementation of proper policies to control rapid population growth with relevant population targets would better serve the aim of protecting the right to survival and development of the people.

Id. at 59.

27. "People's government at each level all [act] according to . . . the population control target set forth by the requirements set forth by these regulations and the higher state authorities." Hebei Sheng Jihua Shengyu Tiaoli [Hebei Family Planning Regulations] art. 10, (adopted by the Standing Committee of the Seventh Hebei People's Congress, Mar. 14, 1989), 1990 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] 422 [hereinafter Hebei Family Planning Regulations]. "People's government at each level shall adopt its population target . . . according to the national and provincial plans." Jilin Sheng Jihua Shengyu Tiaoli [Jilin Family Planning Regulations] art. 5 (adopted by the Standing Committee of the Seventh Jilin People's Congress, July 21, 1988), 1989 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] 369 [hereinafter Jilin Family Planning Regulations].

The link between China's birth control policy and violence against women and girls is in part a product of this top-down process and the supremacy of state policy over law. Though women and children are endowed with some legal rights, such as those set forth in the LPWRI and MIHCL,²⁸ the state may infringe upon them since there are no individual rights superior to the four cardinal principles of the Constitution.²⁹ All legal rights of individuals are subordinated to the state's interest at any given moment.

Local authorities are expected to implement the birth control policy and keep births within quotas determined by the central government. Their success in meeting the quota in their region is seen by their superiors as an index of their "political performance" or as credits for promotion.³⁰ Failure to make a quota entails the risk of disciplinary sanctions, demotion, or a reduction in salary.³¹ These circumstances enhance the likelihood that the use of physical force to limit births is politically motivated.

This top-down policy-making and enforcement process lacks public deliberation, and fails to include input from health experts, demographers, educators, and affected social groups, especially women and peasants. Such input might enable the government to craft a more workable policy. This kind of public deliberation is needed in dealing with sensitive issues such as who should be allowed to carry a pregnancy to term and how couples should plan their reproductive activities and their professional and economic lives. The top-down process tends to be blind to Chinese social reality in the late 20th century. The central government underestimated the strength of popular resistance the policy would have to overcome, and government agents have only been able to meet policy goals through coercion.

C. *The Enforcement Measures*

The "one birth" policy as spelled out in central government resolutions, directives, and provincial regulations can be summarized as follows (specifics vary slightly between provinces and autonomous minority regions):

- (1) Couples should apply for birth permits before they try to conceive a child.³²

28. LPWRI, *supra* note 24; MIHCL, *supra* note 25.

29. See *supra* note 21 and accompanying text.

30. See, e.g., Hebei Family Planning Regulations, *supra* note 27, art. 11; Hunan Sheng Jihua Shengyu Tiaoli [Hunan Family Planning Regulations] art. 6, (adopted by the Standing Committee of the Seventh Hunan People's Congress, December 3, 1989), 1990 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] [hereinafter Hunan Family Planning Regulations]; Jilin Family Planning Regulations, *supra* note 27, art. 6; Shandong Sheng Jihua Shengyu Tiaoli [Shandong Family Planning Regulations] art. 4, (adopted by the Standing Committee of the Seventh Shandong People's Congress, July 20, 1988), 1989 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] 419 [hereinafter Shandong Family Planning Regulations].

31. See, e.g., Hebei Family Planning Regulations, *supra* note 27, art. 30 (stipulating that, if failure to make quota continues into second year, responsible officials will lose their positions).

32. See, e.g., Hunan Family Planning Regulations, *supra* note 30, art. 21; Shandong Family Planning

(2) At least one spouse is required to use "long term" and "effective" contraception after having the permitted number of children.³³ Women are to use an IUD after having the permitted number of children.³⁴

(3) Those who proceed with unauthorized pregnancies, especially after they have already had the permissible number of births, must have their pregnancies terminated. After out-of-plan births, one spouse must be sterilized.³⁵

These measures are guided by quantitative birth quotas (the number of permitted births per year for a particular community), that are normally assigned by the central authorities to each province, autonomous region, and major municipality. Such quotas are further subdivided among provinces, townships, villages, and working units. For example, in 1992, the State Council issued a "Ten-Year Plan" and "The Eighth Five-Year Plan," specifying the population quotas that each provincial government was expected to meet.³⁶ According to the "Eighth Five-Year Plan," for example, population growth in Beijing between 1991 and 1995 was not to exceed 730,000, a growth-rate cap of 13.1% per year;³⁷ the population of Tibet was to grow by no more than 230,000, a cap of 19.91% per year; and in Sichuan, population growth was not to exceed 7,160,000, with growth limited to 12.91% per year.³⁸

Though it has been known as the "one child policy," the national average targeted number of births per couple has actually been slightly higher. Rural couples in many provinces are allowed to have a second child if, for example,

Regulations, *supra* note 30, art. 14. Couples may have to wait for years for permission to conceive, depending on the number of couples planning to have babies in a given community.

33. *See, e.g.*, Guangxi Zhuangzu Zizhiqu Jihua Shengyu Tiaoli [Guangxi Zhuang Minority Autonomous Region Family Planning Regulations] art. 17, (adopted by the Standing Committee of the Seventh Autonomous People's Congress, Sept. 17, 1988), 1989 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] [hereinafter Guangxi Family Planning Regulations]; Shanxi Sheng Jihua Shengyu Tiaoli [Shanxi Family Planning Regulations] art. 14, (adopted by the Standing Committee of the Seventh Shanxi People's Congress, Sept. 22, 1989), 1990 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA], [hereinafter Shanxi Family Planning Regulations].

34. *See, e.g.*, Hunan Family Planning Regulations, *supra* note 30, art. 25; Shandong Family Planning Regulations, *supra* note 30, art. 18.

35. *See, e.g.*, Gansu Sheng Jihua Shengyu Tiaoli [Gansu Family Planning Regulations] art. 17, (adopted by the Standing Committee of the Seventh Gansu People's Congress, Nov. 28, 1989), 1990 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] [hereinafter Gansu Family Planning Regulations]; Shanxi Family Planning Regulations, *supra* note 33, art. 14.

36. Guowuyuan Guanyu Xiada Shinianguihua he "Bawu" Jihua Fengdigu Renkou Zhibiao de Tongzhi [Notification by the State Council Regarding the Ten-Year Plan and the Eighth Five-Year Plan Regional Birth Quota] (adopted Jan. 6, 1992), ZHONGHUA RENMIN GRONGHEGUO FALU FAGUI QUANSHU [THE COMPLETE BOOK OF LAWS AND LEGAL REGULATIONS OF THE P.R.C.] 914-16.

37. *Id.* at 915.

38. *Id.*

their first child was a daughter.³⁹ A third child is, however, strictly forbidden under any circumstances.⁴⁰

The penalties and consequences of noncompliance with the policy fall under several categories:

- (1) *Penalties openly imposed by the policy*: stiff fines;⁴¹ disqualification for benefits such as subsidized child day care, health care, housing and education;⁴² administrative demotion and dismissal from employment.⁴³
- (2) *Penalties and psychological intimidation sanctioned by the policy*: policy-created pressures from co-workers or fellow-villagers;⁴⁴ intimidation and humiliation, including mandatory study sessions, visits by authorities, and public posting and monitoring of menstrual periods.⁴⁵
- (3) *Violence used by government agents*: physical brutality and property destruction, including detention, beatings, and the demolition of residences by local officials, militia acting in a governmental capacity, and the police.⁴⁶

Enforcement varies from region to region,⁴⁷ partly according to the limited discretion of local officials and the social norms within each rural unit and workplace. In some areas, people who do not comply with the policy may

39. In exceptional circumstances, more births may be permitted. The circumstances vary between provinces, and include having had a first child with a non-hereditary disability; both spouses being the only child of their parents; both spouses having returned to China from overseas; being a minority member; and being a resident of a rural mountain region where there is a shortage of laborers. See Tianjin Shi Jihua Shengyu Tiaoli [Tianjin Family Planning Regulations], arts. 7, 8, (adopted by the Standing Committee of the Eleventh Tianjin People's Congress, Nov. 2, 1988), in 1989 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] 341 [hereinafter Tianjin Family Planning Regulations]; Heilongjiang Sheng Jihua Shengyu Tiaoli [Heilongjiang Family Planning Regulations], arts. 7, 8, (adopted by the Standing Committee of the Seventh Heilongjiang People's Congress, Dec. 13, 1989), in 1990 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] 457 [hereinafter Heilongjiang Family Planning Regulations]; Shandong Family Planning Regulations, *supra* note 30, arts. 9, 10.

40. See Joint Directive, *supra* note 7.

41. See, e.g., Tianjin Family Planning Regulations, *supra* note 39, arts. 24, 25; Shanxi Family Planning Regulations, *supra* note 33, arts. 28, 29.

42. See, e.g., Tianjin Family Planning Regulations, *supra* note 39, art. 22; Shanxi Family Planning Regulations, *supra* note 33, art. 18.

43. See, e.g., Shanxi Family Planning Regulations, *supra* note 33, art. 30; Heilongjiang Family Planning Regulations, *supra* note 39, art. 29.

44. Certain local regulations make co-workers and fellow-villagers punishable (by withholding their bonuses, land contracts, or welfare subsidies) if one member of the community violates the policy. See, e.g., Heilongjiang Family Planning Regulations, *supra* note 39, art. 30; Jilin Family Planning Regulations, *supra* note 27, art. 27.

45. See CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 36-57. For a chilling account of public pressure on women to abort their out-of-plan pregnancies, see STEVEN W. MOSHER, A MOTHER'S ORDEAL 261-85 (1993).

46. See WOMEN IN CHINA, *supra* note 1, at 1. In rural areas, the use of coercion seems to be more prevalent. This is partly due to a lapse of government control in rural areas because of the dissolution of the "People's Commune," and partly due to more stubborn resistance by peasants to family planning. See *infra* Part II.B.1-2.

47. See generally Joan Kaufman et al., *Family Planning Policy and Practice in China: A Study of Four Rural Counties*, 15 POPULATION & DEV. REV. 707, 724-27 (1989) (finding enforcement varies in different areas—not all women forced to wear IUDs, or to undergo abortion and sterilization).

be subjected to severe penalties, including physical assault and property destruction.⁴⁸ In other areas, even the penalties imposed by national and regional policies may not be enforced.⁴⁹

In the early stages of implementation, local officials enjoyed significant discretion in enforcing the policy, with some fluctuations in the degree of pressure from the center for compliance.⁵⁰ When politically decentralized policy implementation failed to produce the desired results, the Communist Party Central Committee and the State Council decided to mobilize the huge government bureaucracy to enforce compliance. The 1991 "Decision on Stepping Up Family Planning Work and Strictly Controlling Population Growth" entrusted senior party officials at each level with responsibility for supervising birth control in regions under their administration. According to the new "family-planning target management responsibility contracts" (*jihua shengyu mubiao guanli zerenzhi*)⁵¹ announced in this Decision, the performance of party leaders and government officials is assessed on the basis of their "achievement" of the allocated birth quotas for their areas. Failure to keep the number of births within the quota could mean demotion, stiff fines, or the loss of bonuses.⁵²

These measures for implementing the "one-birth" policy are integral parts of China's national birth control campaign. The implementation tools are not simply improvised by local officials.⁵³ On the contrary, local enforcement officials are carrying out a national policy and risk punishment if they fail to do so. If some have pressed too zealously for compliance, it is largely because of pressure from the center to achieve assigned quotas.

II. LEGAL DEFECTS AND POLICY INCOHESION

In Part I, I argued that discrimination and coercion are the results of state family-planning policies, and not merely the result of corrupt, abusive, or

48. See CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 36-41.

49. *Id.*

50. For discussion of the fluctuating politics of enforcement, see Susan Greenhalgh & Jiali Li, *Engendering Reproductive Policy and Practice in Peasant China: For a Feminist Demography of Reproduction*, 20 SIGNS 601 (1995). The authors identified three stages: 1979-83 (resistance to the policy, especially in rural China); 1984-87 (negotiation between central and local authorities); and post-1988 (submission). *Id.* at 609.

51. Decision on Stepping Up Family Planning Work, *supra* note 18.

52. *Id.* at 912.

53. Some authors assume that the "policy" and its "implementation" operate independently. See, e.g., Lisa Gregory, *Examining the Economic Component of China's One-Child Family Policy Under International Law: Your Money or Your Life*, 6 J. CHINESE L. 45, 46-47 (1992). According to a draft report by the U.S. Immigration and Naturalization Services, "the Chinese government and the U.S. Department of State have indicated that the coercive elements of the family planning program are the result of the isolated excesses of local officials in remote rural areas." *China: Family Planning Policy and Practice in the People's Republic of China*, PROFILE SERIES (Resource Information Center of the U.S. Immigration and Naturalization Service), July 1994, at 20. These claims are seriously challenged in this investigation.

overzealous individual officials. In Part II.A, I discuss the fundamental defects in the policy, analyzing the specific ways the policy operates to coerce and discriminate. In Part II.B, in an effort to explain the government's failure to protect women and children, I analyze the conflicts between family planning and other government policies, the intensified social pressure to defy family-planning policy, and the dynamics of resistance and reinforced state coercion. Incoherence in the state policy has exacerbated clashes between tradition and the birth-control policy and has evoked social violence against women and children.

There are three aspects of the link between state policies and coercive measures used against women and children. First, discriminatory and/or coercive methods are straightforwardly prescribed in provincial family-planning regulations. Considering the center's strong effort to control the provinces, it is implausible that these regulations are hidden from, or enforced in defiance of, the central authorities. Rather, as I argue later in Part II.A, coercive measures found in provincial regulations have been adopted under considerable pressure from the central authorities.

Second, there is a lack of specific statutes to punish government officials or others acting in an official capacity who abuse the rights of women and girls. Because of the lack of specific penalties and prosecution procedures in the policy and in related laws such as the LPWRI and MIHCL, local officials are free to use violence, especially when they are under a great deal of pressure to achieve the rigidly assigned quota. For example, family-planning regulations require that in cases of pregnancies in default of the plan, "measures must be taken to terminate them."⁵⁴ None of the provincial regulations or policy directives specifically forbids forced late abortion, nor have any of them set forth the penalties for punishing those officials who used coercion to force pregnancy termination.

One could argue that the absence of statutes specifically addressing some of the offenses that arise from the coercive family-planning policy is neither a problem with the policy itself nor with the laws such as LPWRI and MIHCL. The statutes on homicide in the criminal code could be applied to cases of female infanticide, and the statutes on assault could be applied to physical coercion of women who have unauthorized pregnancies. In reality, however, as I argue in the following discussions, there is a great deal of prosecutorial laxness in applying the criminal code toward offenses related to the family-planning policy.

This brings us to the third link between state policies and coercive measures against women. Even where penalties are legislated, there is a lack of enforcement. Prosecutions of local officials who authorized or took no

54. See, e.g., Hunan Family Planning Regulations, *supra* note 30, art. 25. In Hebei province, the government made it clear that "all out-of-plan pregnancies must undergo abortion or induced abortion." Hebei Family Planning Regulations, *supra* note 27, art. 18.

action to prevent violence against women in family planning have rarely taken place, according to interviews with Chinese lawyers, family-planning officials, and international human rights monitors.⁵⁵ When the government decides to crack down on certain crimes, as it has done recently in cases of drug trafficking and corruption, state legal agencies swiftly arrest and prosecute large numbers of offenders, prominently publicize their efforts, and display the offenders in public in order to make examples of them to others.⁵⁶ To family-planning enforcement officials, governmental silence and lax enforcement are clear signals that they may use force with virtual impunity while implementing family-planning policies.

A. Defects in the Law

1. Legalized Discrimination and Violence

China's birth-control regulations and relevant laws have permitted discrimination and violence against women and children. In some cases the permission has been explicit; in others it has been implicit. The following examples illustrate the various forms of legalized discrimination and violence under the family-planning policy.

a. Discrimination Against Children

Central government policies and provincial regulations impose stiff penalties for violations of the family-planning policy. These penalties often target out-of-plan children. According to most provincial regulations, children born out-of-plan are not entitled to state subsidies, admission to public day care and schools, and access to public health care.⁵⁷ When couples have out-of-plan children, they invalidate the benefits for their first, "planned" child and have to pay back the benefits that they have enjoyed. The same penalties apply to people who adopt these children without permission.⁵⁸ These regulations also punish parents with stiff fines, salary reductions, or loss of employment, thus weakening parents' ability to provide for their children's nutrition, health and education.⁵⁹

55. See CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1. It is possible that there have been some cases of prosecution, but, as a consistent practice in China, the official press tends not to expose the so-called "dark side" in order to save face and to avoid demoralizing government officials.

56. For documentation of speedy prosecutions, see AMNESTY INTERNATIONAL, CHINA: NO ONE IS SAFE—POLITICAL REPRESSION AND ABUSE OF POWER IN THE 1990S 14-20, 85-97 (1996).

57. See, e.g., Tianjin Family Planning Regulations, *supra* note 39, art. 22, ¶¶ 1, 25, 27, 28; Shandong Family Planning Regulations, *supra* note 30, arts. 29, 32; Anhui Sheng Jihua Shenyu Tiaoli [Anhui Family Planning Regulations], (adopted by the Standing Committee of the Seventh Anhui People's Congress, Oct. 31, 1988), art. 22, 1989 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] 397, 399; Hebei Family Planning Regulations, *supra* note 27, arts. 27, 28.

58. See *id.* art. 24; Heilongjiang Family Planning Regulations, *supra* note 39, art. 29, ¶ 4.

59. On the other hand, the policy offers attractive economic incentives to couples if they make the

Children born into poor families are particularly vulnerable under this policy. Recent government directives and provincial regulations have banned any assistance to poor families who violate the birth policy, no matter how dire the family's circumstances. As one such regulation states: "Couples who violate this regulation and give birth to extra-quota babies . . . and run into subsistence difficulties should not be subsidized nor provided with welfare."⁶⁰ A 1989 State Council's Order conditioned entitlement to the state's poverty aid in several poor regions upon the regions' birth control achievements.⁶¹ It cautioned that the government's financial, technological, and other state assistance to poor regions should not be used to stimulate fertility. The following terms were imposed:

- (1) Poor families that practice birth control should have a priority in getting loans, having access to farming material supply, and entering technology training programs. They should have better opportunity for employment or for selling their products [to the state].⁶²
- (2) Families that have difficulties with basic needs for food and clothing⁶³ should be persuaded to postpone having their second child, even if they qualify for having a second.⁶⁴
- (3) Such poor families with out-of-plan children should not be given any "poverty assistance" until they take effective contraceptive measures. All preferential assistance to them should be suspended. If they are already beneficiaries of "poverty assistance" programs, their participation is terminated and they must pay fines for violating the birth quota.⁶⁵

Because children continue to be born "out-of-plan," these regulations contribute to their neglect and deprivation. By enforcing such penalties, the government breaks its promise to ensure adequate nutrition, health care, and

"one birth" pledges. Such incentives often include free health care, day care and education, food and cash subsidies. In rural areas, couples with only one child are sometimes awarded favorable land contracts. See Heilongjiang Family Planning Regulations, *supra* note 39, art. 29, ¶ 2; Shanxi Family Planning Regulations, *supra* note 33, art. 30, ¶ 1; Tianjin Family Planning Regulations, *supra* note 39, arts. 22, ¶ 1-2, 24, 25.

60. See Hunan Family Planning Regulations, *supra* note 30, art. 43.

61. Guowuyuan Bungonytin Zuanfa Guojia Jihuashenyu Weiyuanhui, Pingkundiqu Kaifa Lingdaoxio-zhu Guanyu Fupinggongzhuo yu Jihuashenyu Gongzhuo Xiangjiehe Baogao de Tongzhi [The State Council Notification Introducing the Report on Combining Poverty Assistance Work with Family Planning Work] (adopted 1989), ZHONGHUA RENMIN GONGHEGUO FALU FAGUI QU ANSHU [THE COMPLETE BOOK OF LAWS AND LEGAL REGULATIONS OF THE P.R.C.], 910-911 [hereinafter State Council Notification] (requiring that state aid be halted if family planning regulations are intentionally violated).

62. *Id.* at 911.

63. A State Council Notification on poverty assistance estimated that, by the end of 1988, 40% of those entitled to aid under the Notification were without adequate food or clothing. See State Council Notification, *supra* note 61, at 910. The government estimated that, by the end of 1994, 70 million people in rural China were living in poverty. INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, THE PROGRESS OF HUMAN RIGHTS IN CHINA (1995), reprinted in *Human Rights Issue Explored*, CHINA DAILY, Dec. 28, 1995, at A2 [hereinafter 1995 WHITE PAPER].

64. State Council Notification, *supra* note 61, at 911.

65. *Id.*

education for children, as provided by Chinese law⁶⁶ and the U.N. Convention on the Rights of the Child,⁶⁷ which China has ratified.⁶⁸ In fact, the government penalizes these children for being born and for their parents' violations of governmental policies by withdrawing these children's and their siblings' entitlement to basic care.

b. *Discrimination Against Female Children*

The family-planning policy sometimes allows a second child in cases where the first child is female. Such policies may be motivated by efforts to be sensitive to the arguably unintended consequences (such as female infanticide) of the rigid birth control policy. The stipulation that couples with a girl can, under certain conditions, have a second child shows some flexibility. Its adoption may be intended to help reduce the ill-treatment of female children. In the 1980s, in rural areas, forced compliance with the birth control policy had resulted in a rise in the rate of incidents of female infanticide and abandonment of girls, with five percent of female infants disappearing from the records in national surveys.⁶⁹ In response to this return of traditional practices, many provincial governments made room to allow couples to have a second child if their first was a girl, so that they did not have to hide, abandon, or kill their daughters in an attempt to try again, legally, for a son.

Policies that allow for a second child after a daughter sometimes impose additional conditions. For instance, in Shandong, one parent must also either have been a mining worker for five consecutive years, or have become disabled.⁷⁰ In Tianjin, the couple must also reside in a rural mountain area with a shortage of laborers.⁷¹ In some minority autonomous regions, couples with one female child can have another birth without strings attached.⁷² By 1989, eighteen provinces had legitimized this so-called "one-daughter family" (*dunuhu*) policy.⁷³

This effort, however, does not address the root problems of abuse of female children. One cause is the birth-control policy's conflict with rural economic reform policies, which creates pressure for rural families to prefer

66. See MIHCL, *supra* note 25; LPWRI, *supra* note 24; *infra* Part III.B.

67. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 24, U.N. Doc. A/44/736, 28 I.L.M. 1448 [hereinafter Children's Convention].

68. See *infra* note 195 and accompanying text.

69. See Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards An(other) Vision*, 23 COLUM. HUM. RTS. L. REV. 249, 256-57 nn.26 & 28-29 (1992) (stating 5% of all infant girls in the Chinese population are unaccounted for).

70. See Shandong Family Planning Regulations, *supra* note 30, art. 7, ¶¶ 5, 7.

71. See Tianjin Family Planning Regulations, *supra* note 39, art. 8, ¶ 4.

72. Guangxi Family Planning Regulations, *supra* note 33, art. 10, ¶ 1.

73. See, e.g., Jilin Family Planning Regulations, *supra* note 27, art. 11, ¶¶ 1-4; Anhui Family Planning Regulations, *supra* note 57, art. 5, ¶¶ 3, 13; Hebei Family Planning Regulations, *supra* note 27, art. 14, ¶¶ 8-9. For a discussion of "one-daughter family" policy, see Zeng Yi, *Is the Chinese Family Planning Program "Tightening Up?"*, 15 POPULATION & DEV. REV. 333, at 335 (1989).

male children.⁷⁴ Instead, this "dunuhu" policy takes the seemingly expedient approach to female child abuses without considering its grave social consequences, i.e., perpetuating social discrimination against baby girls. In fact, this policy gives official legitimization to sex discrimination by codifying it into governmental birth regulations. It sends the public the message that exceptions to the restriction on birth rates are permitted if the survival of male lineage in the family is endangered.⁷⁵ This policy makes the sex of the first child the key factor in determining the number of births to be permitted per couple. A female first-born seems a less-than-whole baby and needs to be supplemented by a second child in order to count as much as one male first-born.⁷⁶

Many commentators blame the "backward" traditions among the masses for sexist attitudes toward female children,⁷⁷ which have undeniably contributed to the cruel practices against baby girls long before the family-planning policy was adopted. The "dunuhu" policy, however, perpetuates such sexist biases and signals to the "backward" masses that it is acceptable and legal to continue the traditional practice of treating female children as less valuable. Alternative ways of dealing with the problems by addressing their root causes are discussed in the Conclusion.

c. Legalized Eugenics

Since the early 1980s, national and provincial governments have enacted eugenics laws that authorize coercion. In 1986, the Ministry of Health promulgated guidelines for the regulation of marriage and childbearing.⁷⁸ The guidelines prohibit people with hereditary diseases or family histories of mental illness or retardation from having children.⁷⁹ They also require the abortion

74. See *infra* Part II.B.1.

75. For example, in Shandong, a couple can have a second child if the husband and wife are both rural residents and the husband is the only one who can have children among all his brothers. See Shandong Family Planning Regulations, *supra* note 30, art. 8, ¶ 2.

76. See Ann D. Jordan, *Women's Rights in the People's Republic of China: Patriarchal Wine Poured From a Socialist Bottle*, 8 J. CHINESE L. 47, 92-95 (1994).

77. Many scholars in the People's Republic of China have blamed cultural traditions for the return of practices such as infanticide and the abandonment of infant girls. See Mu Guanzong, *Jingnianlai Zhongguo Chusheng Xingbiebi Shengao Piangao Xianxiang de Lilun Jieshi* [A Theoretical Explanation of Recent Rise in Sex Ratio at Birth in China] 1 RENKE YU JINGJI [POPULATION & ECONOMICS] at 50 (1995) (discussing the "strong preference for sons" at the core of "a culture of Chinese traditional reproduction"); see also Li Yongping, *Yiner Xingbiebi Jiqihe Shehui Jingjibianliang de Guanxi: Pucha de Jieguo he Shuofanyin de Xianshi* [Infant Sex Ratio and Its Relationship with Socio-economic Variables: Results of Population Census and the Reflected Realities], 4 RENKE YU JINGJI [POPULATION & ECONOMICS] at 3, 6, 12-13 (1993) (discussing how traditional preference for male children affects treatment of baby girls); Wang Xiaoyan, *Zhongguo Chuantongwenhua yu Zhongguo Dute de Shenyuguan* [Chinese Traditional Culture and China's Unique Idea of Reproduction] (1994) (arguing Chinese historic culture poses severe constraints on people's views of reproductive ethics) (abstract of unpublished paper on file with author).

78. Yichang Qingkuang de Fenlei Zhidao Biaozhun [Guiding Criteria for Classification of Abnormal Cases], Ministry of Health (released July 21, 1986), reprinted in CHINESE WOMEN LAW BOOK 669 (All China Women's Federation ed., 1993) [hereinafter Guiding Criteria for Abnormal Cases].

79. *Id.* at 669-70.

of fetuses in some cases where parents fail genetic screening tests.⁸⁰ The new MIHCL made this policy a national law. Such legislation is, in fact, part of the family-planning campaign, one of the stated goals of which is the improvement of the "quality" of the Chinese population.⁸¹ These eugenic measures add to the legitimization of forced abortion and sterilization measures against certain categories of people.

The Ministry of Health's draft "Guiding Criteria for Classification of Abnormal Cases" listed four categories of persons who are permitted to marry but not permitted to have children. These include couples in which both spouses are "born deaf-mute due to a hereditary disease or disorder,"⁸² or in which at least one spouse has hereditary "schizophrenia, manic depression, or heart disease."⁸³

The provincial family-planning regulations contain similar language. In Shandong Province, for instance, "[t]hose who have been found to have the possibility to give birth to severely defective babies or babies with severe hereditary diseases . . . should be banned from having children; if pregnant, the pregnancy should be terminated."⁸⁴ In Shanxi, "[i]f one spouse is insane (*chī*), an idiot (*dai*), or a fool (*sha*), or has any other hereditary disease likely to cause severe defects in descendants, that spouse should be sterilized."⁸⁵ Jilin⁸⁶ and Gansu⁸⁷ have similar regulations.

Responding to criticism, the government tried in the recently enacted MIHCL to change the rules governing mandatory sterilization. Yet even with these changes, people with serious hereditary diseases, "legal [or legally

80. *Id.* at 770.

81. Anyone familiar with the Chinese language might point out that the Chinese name for this policy is better translated as "superior (or optimum) birth and upbringing" (*you sheng you yu*). It could well be a policy promoting quality prenatal, maternal and infant care. In this sense the translation should not be "eugenics" in the sense of biological engineering to select "superior" genes. However, implementation measures have included provisions legalizing eugenics measures. See *supra* notes 78-80, *infra* notes 82-87 and accompanying text.

82. Guiding Criteria for Abnormal Cases, *supra* note 78, at 669.

83. *Id.*

84. Shandong Family Planning Regulations, *supra* note 30, art. 17. Similar language is found in Hunan Family Planning Regulations, *supra* note 30, art. 23; Heilongjiang Family Planning Regulations, *supra* note 39, art. 12; Guangxi Family Planning Regulations, *supra* note 33, art. 16; Gansu Family Planning Regulations, *supra* note 35, art. 16; Shanxi Family Planning Regulations, *supra* note 33, art. 13.

85. Shanxi Family Planning Regulations, *supra* note 33, art. 13.

86. Jilin Family Planning Regulations, *supra* note 27, art. 15.

87. Gansu has the most comprehensive eugenics regulation, which prohibits "*chi dai sha*" persons (defined as those whose conditions are hereditary, whose IQ is below 49, and who face language, memory, orientation, thinking, and other behavioral obstacles) from marrying until they undergo sterilization. Gansusheng Renda Changweihui Guanyu Jingzhi Chi dai Sha-Renshang yu de Guiding [The Regulation Banning *chi dai sha* Persons from Giving Birth], art. 2, (adopted by the 5th Sess. of the Standing Comm. of People's Cong. in Gansu Province on Nov. 23, 1988) in 1989 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] 469. If a pregnancy occurs, it must be terminated and the woman must be sterilized. *Id.* art. 5. According to officials, most of the province's 260,000 retarded people have been sterilized since this regulation came into effect. Nick Ruffords, *China Moves To Ban Babies with Defects*, THE SUNDAY TIMES (London), Feb. 5, 1995. The number of sterilizations between January 1989 and June 1991 alone in Gansu was given as 6,271. Chiang Fu-mei, *Some 6,000 Child-Bearing Retarded Adults Undergo Sterilization Operation in Gansu*, MING PAO, Jan. 31, 1992, reprinted in FBIS-CHI-92-029, Feb. 12, 1992, at 48.

defined] contagious disease[s],” or “relevant mental disorder[s],” are told to “postpone their marriage”⁸⁸ and, if either partner has “a serious hereditary disease, . . . the couple may marry if they agree to take long-lasting contraceptive measures or give up child bearing by undergoing ligation.”⁸⁹ While this law stipulates that ligation or the termination of a pregnancy has to be consented to by the pregnant woman (or, if she is “legally incompetent,” by her guardian),⁹⁰ serious doubt remains that this gives a woman much protection in practice. The tremendous pressures involved in the family-planning campaign, as discussed above,⁹¹ make it very difficult for women not to “agree” to an abortion or sterilization.

Provincial regulations and an earlier draft of the MIHCL (originally called the Eugenics Law) created an uproar both in China and abroad.⁹² Some Chinese health and genetic biology experts are concerned that these provisions are based on assumptions lacking a sound scientific basis.⁹³ In fact, these measures may have been motivated more by the governmental drive for low birth rates than by science. The world scientific community long ago rejected the assumptions upon which the Chinese eugenics policy was partially based—that mentally disabled individuals will beget children with the same disabilities.⁹⁴ The current scientific understanding is that genetic diagnosis can, at its best, help to predict the likelihood of certain diseases in a fetus. Furthermore, the World Medical Association requires physicians to “maintain the utmost respect for human life from its beginning even under threat” and not to use their medical knowledge “contrary to the laws of humanity.”⁹⁵

d. *Forced Abortion and Infanticide*

The Chinese government is implicated in violence and discrimination against women and children through the enforcement of state policies and legal provisions that implicitly grant permission to use violent measures. As shown above in Part I, the threat of administrative penalties exerts a great deal of

88. See MIHCL, *supra* note 25, art. 9.

89. *Id.* art. 10.

90. MIHCL, *supra* note 25, art. 19.

91. See *supra* Part I.C.

92. Ruth Youngblood, *China Law Defers Disabled Marriages*, UPI, Oct. 27, 1994 (noting that the MIHCL was originally called the “Eugenics Law” when submitted to the National People’s Congress in December 1993, but was renamed “to placate fierce criticism from Western countries”).

93. Officials at the State Family Planning Commission and the Gansu Family Planning Commission reportedly lobbied the central government to repeal the Gansu Province regulation. Interview with a family planning official, in New York, N.Y. [neither the official’s identity, nor the date of the official’s visit to New York can be revealed in order to protect the official’s safety] (notes on file with author).

94. This policy, though, may also be based on the assumption that disabled parents cannot care properly for their offspring.

95. *Passage of Discriminatory Eugenics Law*, AM. ASS’N. ADVANCEMENT SCI. HUM. RTS. ACTION NETWORK (Science & Human Rights Program, American Ass’n for the Advancement of Science, Wash. D.C.), Apr. 14, 1995, at 2 (quoting Declaration of Geneva, adopted by World Medical Association in 1948) (on file with author).

pressure on couples to control birth and terminate unauthorized pregnancies. Under such pressures, women often find they have no choice but to undergo sterilization or abortion,⁹⁶ even when the pregnancy is well-advanced.⁹⁷ For example, the Jilin Family Planning Regulation mandates that "all out-of-plan pregnancies caused by failures of contraceptives should be terminated,"⁹⁸ but no stipulation of any specific gestational period is given beyond which the performance of such terminations is prohibited. Since no restriction on gestational period is imposed and the goal is to achieve the targeted birth quota, family-planning officials are obligated and motivated to track down women with "out-of-plan" pregnancies and make sure that they have abortions, regardless of how far their pregnancies have advanced.

When fetuses survive forced late abortions, they are sometimes promptly suffocated to death with sheets by health workers.⁹⁹ Though regulations do not explicitly urge doctors to perform this practice, neither do they prohibit them from doing so. Doctors or nurses who let these babies live without permission from family-planning authorities are in principle punishable for "malpractice," "refusing to carry out family-planning policy," or for "interfering with family-planning officials in the performance of their duties."¹⁰⁰ Unlike the better-known practice of female infanticide¹⁰¹ by families, the killing of fetuses who survive late-term induced abortion is not the result of parental decisions, but is the result of enforcement by authorities who supervise abortions of "illegal" pregnancies. Such killings are carried out virtually under official order and are often overseen by family-planning officials.

Family-planning officials, in turn, are under pressure to carry out the policy. As discussed in Part I.C., the birth control policy penalizes those officials who fail to achieve quotas and attempt to circumvent the policy. According to a central government legal directive, anyone who forges a "birth

96. In some regions, if a woman manages to go into hiding to avoid forced abortion, her family and those who provide her with hiding places face heavy fines. In Anhui Province, the regulation specifies that such a fine is between 300 and 500 yuan. Anhui Family Planning Regulations, *supra* note 57, arts. 22, ¶¶ 3, 23. In Hunan, it is 400 to 800 yuan. The same fine also applies to parents of babies born out of wedlock. Hunan Family Planning Regulations, *supra* note 30, art. 30.

97. A journalist who was permitted to accompany a government "task force" rounding up women for forced abortion and sterilization reported that some of the women crowded into the county hospital awaiting abortions were more than six months pregnant. Liu Yin, *China's Wanted Children*, THE INDEPENDENT, Sept. 11, 1991, at 25. Chi An, a woman who was trained as an abortionist in China in the early 1980s, reports that her training program included assisting doctors in performing forced late-term abortions. STEVEN W. MOSHER, A MOTHER'S ORDEAL 254 (1993). The ethics of forcing women to undergo abortions in the late stages of pregnancy, however, are not uncontroversial. See Li Benfu, *An Ethical Analysis on 41 Cases of Abortion Undergone by Pregnants with 28 Weeks and Its Countermeasures* (1994) (abstract of unpublished paper on file with author) (Li, Professor of Medicine at Beijing Medical University, concludes doctors should not perform involuntary late-term abortions).

98. See Jilin Family Planning Regulations, *supra* note 27, art. 18.

99. See CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 51.

100. See Hebei Family Planning Regulations, *supra* note 27, art. 32. See also Gansu Family Planning Regulations, *supra* note 35, art. 44, and Jilin Family Planning Regulations, *supra* note 27, art. 35.

101. See *supra* note 69 and accompanying text; *infra* notes 114-117 and accompanying text.

permission certificate" or issues "illegal" birth certificates that legitimize out-of-plan births is punishable under the P.R.C. Criminal Law.¹⁰² Also, under the aforementioned "family-planning target management responsibility contracts,"¹⁰³ officials face stiff fines, demotion, or dismissal if the birth quota for the areas for which they are responsible is not achieved.

The mandatory birth quota and its accompanying legal penalties pressure family-planning officials into using all means at their disposal, including coercive means, to ensure the fulfillment of birth quotas. Some rural officials even mobilize local militia (*minbing*)¹⁰⁴ or request assistance from county police to hunt down women who have not voluntarily undergone abortion or sterilization as required by the regulations. The armed men, accompanied by family-planning officials, deliver these women to the clinics. In instances documented in different parts of the country, these men have surrounded the homes of women who went into hiding, beating up their husbands, confiscating their furniture and destroying their houses.¹⁰⁵

2. Lack of Implementation Mechanisms

This section examines situations where the family-planning policy and relevant legislation provide for the protection of the rights and interests of women and children but then fail to specify necessary mechanisms for implementation. The policy has been mostly directed toward penalizing those who evade birth control restrictions or interfere with or obstruct family-planning officials' work. However, it is virtually silent on punishing violations by government officials of women's and children's rights and interests.

a. No Penalties for Officials who Violate Women's and Girls' Human Rights

Centrally-enacted laws, such as the LPWRI and MIHCL, prohibit violence against women and baby girls. As LPWRI states, "Discriminating against, abusing, or injuring women is prohibited."¹⁰⁶ And "Women's rights to life and health brook no infringement."¹⁰⁷ The LPWRI is more detailed and

102. Zhuigao Renmin Fayuan Zhuigao Renmin Jianchayuan Guanyu Yifa Yiancheng Puohuai Jihua Shengyu Fangzuihuodong de Tongzhi [Supreme People's Court and Supreme People's Procuratorate Notification on Severe Legal Punishment of Criminal Activities Sabotaging Family Planning] (adopted 1993) [hereinafter Notification on Sabotaging Family Planning], in 1 JIANCHAYUAN BAOGAO [PROCURATORATE REPORT] at 13-14 (1994).

103. Decision on Stepping Up Family Planning Work, *supra* note 18.

104. Local militiamen are able-bodied volunteers, often veterans or locally trained young activists, who are paid by the authorities to carry out special tasks such as keeping public order and assisting family planning in the communities.

105. See WOMEN IN CHINA, *supra* note 1, at 25; CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 39.

106. See LPWRI, *supra* note 24, art. 2.

107. *Id.* art. 35.

specific in comparison to previous legislation protecting women's rights, such as the Marriage Law. It has provisions against crimes that have not been seriously dealt with previously in Chinese laws, such as the crimes "to drown, forsake, or cruelly injure or kill baby girls," "to discriminate against or abuse women who give birth to baby girls or bear no children" and "to cruelly injure or kill women by superstitious or violent means."¹⁰⁸

These practices are also officially prohibited by provincial family-planning regulations. "[T]he killing, abandoning, [and] abuse of female babies and their mothers" is prohibited, and "violations should be punished by administrative measures, and where criminal law applies, legal measures should be sought."¹⁰⁹

While these laws should apply to all such violations, including those committed while purportedly carrying out the family-planning policy, no specific penalties for violations by officials acting in a governmental capacity to enforce policies are stipulated in either the LPWRI or MIHCL.¹¹⁰ Instead, these laws and some provincial regulations claim that the Administrative Procedures Law and the Criminal Law provide a legal basis for individual citizens to seek redress against local family-planning authorities who go beyond the regulations in implementing birth control.¹¹¹ But little actual protection is offered under these laws. For example, articles 2 and 35 of LPWRI simply list certain practices as "prohibited" in society without specifying how violations by officials will be punished and what penalties will be meted out. When the LPWRI makes specific references to the P.R.C. Criminal Law and the Security and Administration Punishment Act, it does not render directly punishable officials who use violence against women. For example, the LPWRI was appended with a list of penalties from the Criminal Law that the lawmakers recommended as applicable to and adequate for punishing crimes of violence against women and girls. Authorities have thus been able to refer to this appendix as proof that violence against women by officials in connection with family planning is addressed by P.R.C. Criminal Law. But on this appended list, the only article that speaks of punishing state agents says that "state personnel who abuse their powers and use public office for private gain—carrying out retaliation or frame-ups against those making complaints, petitions, or criticisms—are to be sentenced to not more than two years of

108. *Id.*

109. Shandong Family Planning Regulations, *supra* note 30, art. 34. See also Hebei Family Planning Regulations, *supra* note 27, art. 32, ¶¶ 3-4; Anhui Family Planning Regulations, *supra* note 57, art. 27, ¶ 1. The Criminal Law of the P.R.C. considers intentional killing a crime. Zhonguo Renmin Gongheguo Xingfa [Criminal Law of the People's Republic of China] (adopted 1979), art. 132, available in LEXIS, INTLAW Library, CHINAL File [hereinafter Criminal Law]. Additionally, the Constitution prohibits maltreatment of children. See XIANFA [Constitution] art. 49, ¶ 4 (1982).

110. For an analysis of this problem, see Jonathan Hecht, *The Legal Protection of Women's Rights in China: Discretionary Enforcement of Human Rights Norms*, CHINA RIGHTS FORUM 4 (Fall 1995).

111. This claim was made, for example, in the LPWRI, *supra* note 24; in Hebei Family Planning Regulations, *supra* note 27, art. 32; Anhui Family Planning Regulations, *supra* note 57, art. 27; Shandong Family Planning Regulations, *supra* note 30, art. 35.

fixed-term imprisonment or criminal detention; when the circumstances are serious, the sentence is to be not less than two years and not more than seven years of fixed-term imprisonment."¹¹² Officials are punishable under this law only if they retaliate against those who file complaints for their abuses. There is no mention of whether officials who are abusive or use violence will be prosecuted independently of the victim filing a complaint and suffering reprisals as a consequence. In other words, if women do not themselves file complaints of being taken away or detained, of their husbands being beaten up or of their houses being demolished, then the officials who violate the LPWRI are unlikely to be penalized.

If "cruel injury and killing" by government officials were systematically handled under criminal codes governing assault and murder cases, there should be no need for specific laws relating to violence by officials. But the LPWRI's failure to specify penalties for abusive officials implies that abusive officials will not be subjected to criminal laws and may evade responsibility for their offenses. Enforcement of specific state policies such as family planning often take priority over the law. In this sense, the LPWRI's failure to provide penalties for the use of violence by officials means that its promise to punish violence against women is an empty one.¹¹³

b. *The Disappearance of Baby Girls*

Due to the lack of terms of punishment, the LPWRI, MIHCL and provincial regulations may thus have little impact on checking the use of violence in the birth control campaign. The violence has taken a particularly heavy toll among female infants. One useful indicator of female infants' plight in recent years is the skewed sex ratio at birth¹¹⁴ and the disappearance of millions of baby girls.¹¹⁵ These demographic results are most likely due to the resurgence of traditional practices such as female infanticide,¹¹⁶ sex-

112. Criminal Law, *supra* note 109, art.146. See Appendix: Relevant Articles of Laws to LPWRI, *supra* note 24.

113. For a discussion of how LPWRI provides individual women with little opportunity to take legal action to protect their rights, see Hecht, *supra* note 110, at 4-6, 13.

114. The 1990 census data, which examined 10% of the population, put the ratio at birth at 111.4 boys born to every 100 girls born. The world average is 105 or 106. Li Yongping, *supra* note 77, at 3. The sex ratio at birth in Zaozhuang city, Shandong Province, during the first half of 1993 reached 144.6 boys to 100 girls, and in Tengzhou city of the same province, the ratio during the same period was 163.8. Mu Guangzong, *supra* note 77, at 50.

115. Terence H. Hull calculated that, for the year 1986 alone, over half a million female births were missing. Hull, *Recent Trends in Sex Ratios at Birth in China*, 16 POPULATION & DEV. REV. 67 (1990).

116. One fact supporting the suspicion that female infanticide might not just be a rare phenomenon is that the large discrepancy between male and female babies cannot be squarely explained by the number of female fetuses aborted and the number of girls concealed from census workers. These girls have not resurfaced in subsequent surveys of older age-group children. If they had been in hiding, local officials would sometimes have allowed them to get registered after a few years of being "underground." But it is also possible that these "disappeared" girls may have made their way into orphanages and adopted families because the number of female orphans and adopted female children has seemed to increase. Exact calculation, however, is not possible due to lack of accurate data.

selective abortion, and abandonment and concealment¹¹⁷ of female babies, combined with under-reporting of female births and the offering of female babies for adoption.

Because laws and provincial regulations lack specific penalties and enforcement procedures, those who commit female infanticide,¹¹⁸ sex-specific abortion, or abandonment of baby girls run very little risk of actually being caught and prosecuted. For instance, the Tianjin Regulation stipulated that those guilty of "abandoning, cruelly killing or hurting infants" or "abusing female infants and their mothers" were "to be given administrative discipline by their working unit; if [their action] violates the P.R.C. Security and Administration Punishment Act, they are given administrative penalties by public security agencies; if [their action] constitutes crime, the judiciary system should seek legal responsibility according to the law."¹¹⁹ However, it was left to the working units to decide what "administrative discipline" should be given, and, as discussed above, existing laws are inadequate to punish criminal acts against baby girls.

Under China's current legal system, the government has generally failed to act against crimes unless the victim presses charges. The victim has to be persistent in suing and bringing charges against the defendants. In "minor" cases of assault and injury, the victim must initiate a private prosecution. If she is persistent and successful in getting the court's attention, her abuser might be punished.¹²⁰ Abandoned, abused or neglected infants and children are extremely unlikely to press for suits to be brought.¹²¹

The Criminal Law provides for light sentences of up to two years even when the crime is "odious," and up to seven years when it results in "serious injury or death."¹²² Even in "odious" cases, if the victim withdraws her suit,

117. Some baby girls may have been born and are still alive, but their parents have concealed them from official registration, national surveys, and/or local authorities, in order to be able to have, legally, male children. In rural areas where residents may live far apart it is not difficult to "hide" little children. In addition, sympathetic fellow villagers and even local officials (who are often relatives of those who want to have more children or are afraid of rich village elites) tend to either assist with or ignore such concealment. The recent internal migration, which created a floating population, also makes concealment of children much easier than in the past.

118. For a discussion of female infanticide in China, see Hom, *supra* note 69 at 255, n.20 (referring to female infanticide as "the induced death (euthanasia) of infants by suffocation, drowning, abandonment, exposure, or other methods"). See also Nicholas D. Kristof, *A Mystery from China's Census: Where Have Young Girls Gone?*, N.Y. TIMES, June 17, 1991, at A1; *Surge in Girl Baby-Killing*, CHI. TRIB., Feb. 22, 1990, at C19.

119. Tianjin Family Planning Regulations, *supra* note 39, art. 30. Similar stipulation is also found in Hunan Family Planning Regulations, *supra* note 30, art. 45 (where "the sale and purchase" of baby girls is also listed as a crime); Shandong Family Planning Regulations, *supra* note 30, art. 34; Hebei Family Planning Regulations, *supra* note 27, art. 32.

120. For instance, a court in Liaoning Province declined to prosecute a man who had beaten his wife and broken her eardrum. The court ruled that the wife had to bring the case herself. Jordan, *supra* note 76, at 91.

121. Jordan notes that, although a civil suit could be brought under the LPWR, there is no one who would sue since the only persons who have a legal standing to sue are the victims and their families, who "are either dead (the infants) or the perpetrators (the parents)." *Supra* note 76, at 95.

122. Criminal Law, *supra* note 109, art. 182. For a discussion of how the Chinese legal system fails to protect women, see Jordan, *supra* note 76, at 76-83, 90-96. See also Paul D. McKenzie, *China and the*

generally the case will not proceed. The defendants in most cases of infanticide and abandonment are the parents or relatives of infants. The existing law tends to penalize with relative leniency those who harm family members, including those guilty of female infanticide or abandoning baby girls. For example, the Security and Administration Punishment Act requires the following:

Violations of such personal rights as beating other people and causing minor injuries, maltreating family members, or illegally restricting other people's personal freedom are subject to 15 days or less of detention, or a fine of 200 yuan or less, or a warning if the violation is not serious enough for criminal punishment.¹²³

Article 182 of the Criminal Code specifies a sentence of only two years or less to those who commit particularly "odious" physical abuse of family members.¹²⁴ In comparison, strangers (i.e., non-family members) who commit such crimes are given much heavier penalties.¹²⁵

The LPWRI continues to let the punishment be handled by the existing criminal laws, which are largely inadequate for protecting women and infant girls. Because the LPWRI fails to provide for enforcement mechanisms, the only remedies available are those provided by ineffectual legislation adopted before the LPWRI. These legislative omissions in the LPWRI in part explain why very few cases of female infanticide and abandonment have been prosecuted. The recent rise of these practices is thus not attributable simply to the backwardness of peasants who are said to cling to traditional feudal values.¹²⁶ Female infanticide, as one legal scholar writes, "must be reconceptualized as more than a privatized prohibited social practice whose causes stem from the remnants of feudalism. The killing of girl-infants is a form of violence against the infant herself, the mother, and all women in the society in which the practice occurs."¹²⁷

Women's Convention: Prospects for the Implementation of an International Norm, 7 CHINA L. REP. 23 (1991) (discussing absence of effective enforcement and independent judiciary in China and how it contributes to failures in women's rights protection); Hecht, *supra* note 110.

123. Zhonghua Renmin Gongheguo Zhian Guanli Chufa Tiaoli [P.R.C. Security and Administration Punishment Act] (adopted 1986), art. 22, in 1987 ZHONGGUO FALU NIANJIN [LAW YEAR BOOK OF CHINA] 90.

124. Criminal Law, *supra* note 109, art. 182.

125. See Jordan, *supra* note 76, at 91 (noting that penalties for beating women depend on whether the assailant is her husband or a stranger).

126. See *supra* note 77.

127. Hom, *supra* note 69, at 258.

3. Lack of Law Enforcement

As noted above, the rights and interests of women and children are supposed to be protected under the LPWRI, the MIHCL, and the various family-planning regulations. In addition to inadequate implementation mechanisms, however, the failure to use available mechanisms when they do exist leaves women and children vulnerable to discrimination and violence in family-planning campaigns. When such violations occur, legal instruments have rarely been utilized to render punishment or remedies. There may have been isolated cases of prosecutions, but they have not been publicized, perhaps for the following reason: by rarely pressing prosecutions of officials who abuse power, the government may wish to avoid harming the morale of family-planning workers and discouraging their efforts to achieve the birth-rate targets. Also, central control over the increasingly autonomous local officials has diminished with the implementation of market reforms.

a. Sex-Selective Abortion of Female Fetuses

Existing law for prosecuting this crime has rarely been enforced. The practice of prenatal sex identification, which has led to the abortion of many female fetuses, is almost a routine practice in cities and towns where ultrasound technology is available, though officially declared illegal.¹²⁸ The availability of ultrasound, together with the ease of obtaining abortion on demand, makes it almost irresistible for couples who prefer sons to take the test to determine the sex of their babies and abort female fetuses.¹²⁹

Officials do not deny the pervasiveness of this practice and have passed legislation to ban it and penalize violations.¹³⁰ Provincial regulations have also prohibited the use of ultrasound technology for the purpose of sex selection.¹³¹ The new MIHCL stipulates that "[i]dentification of the sex of a fetus through technological means is strictly forbidden unless it is necessary on medical grounds."¹³² When certified doctors "perform the identification of a fetus's sex," "administrative punishment" should be meted out and "the

128. Three existing technologies can be used to determine the sex of a fetus: amniocentesis, chorionic biopsy, and ultrasound. Amniocentesis and chorionic biopsy are still not easily obtainable in small cities and towns, but have become available in major municipal, provincial, and army hospitals. Ultrasound, however, can be administered in most hospitals, even those at the county level. The first ultrasound machines were manufactured in China in 1979, and by 1987 about 13,000 machines were used in Chinese hospitals, averaging six per county. Mu Guangzong, *supra* note 112, at 50, n.1.

129. According to Chinese officials, ultrasound was used in 2,316 cases in one county to determine the sex of the fetus, resulting in abortions of 1,006 female fetuses. Nicholas D. Kristof, *Chinese Turn to Ultrasound, Scorning Baby Girls for Boys*, N.Y. TIMES, July 21, 1993, at A1.

130. Notification on Sabotaging Family Planning, *supra* note 101, at 13.

131. See Tianjin Family Planning Regulations, *supra* note 29, art. 30, ¶ 2; Anhui Family Planning Regulations, *supra* note 58, art. 27, ¶ 3; Jilin Family Planning Regulations, *supra* note 26, art. 35, ¶ 3; Guangxi Autonomous Region Family Planning Regulations, *supra* note 32, art. 31, ¶ 9; Hunan Family Planning Regulations, *supra* note 29, art. 44, ¶ 4.

132. MIHCL, *supra* note 23, art. 32.

person involved should be deprived of his operating qualification according to the law."¹³³

Because similarly worded provincial regulations have not been effectively enforced, the MIHCL can be expected to have little deterrent effect on the widespread use of sonograms for sex selection. The nearly nonexistent prosecution and punishment rate for this offense indicates that law enforcement officials are either unwilling or unable to enforce the law. A number of factors have contributed to this laxness, including the widespread cooperation of medical services providers, both for profit and as a service for family and friends. Strict birth control measures and couples' strong desire for sons has made the demand for sex-screening so overwhelming that screening has become a profitable business. As the Ministry of Public Health admitted, "[t]o make more money, some hospitals, including some individually run clinics, are in the business of sex-forecasting."¹³⁴ The growing market economy also encourages trading in ultrasound scanning services.¹³⁵ In addition, many physicians secretly perform tests for relatives and friends. Virtually anyone who has a personal connection to a physician or can offer money or gifts can be served.

b. *Abandonment of Baby Girls*

This practice has flourished despite the presence of laws explicitly enacted to prohibit "drown[ing], forsak[ing]," injuring, or killing baby girls.¹³⁶ Most infants abandoned are female. Female orphans constitute the overwhelming majority of children in ill-equipped orphanages throughout the country.¹³⁷ Child abandonment is an age-old practice in China, largely due to poverty or out-of-wedlock birth, but the recent cases have also resulted in part from the birth-control policy. Parents desperate for boys may have to try many times in order to have their wish fulfilled. At the same time, they may fear punishment for having more than the permitted number of children. They may thus resort to female child abandonment. Unwanted daughters could have been given up for adoption. But certain jurisdictions punish parents who give up "out-of-plan" children for adoption or who adopt such children without special permission.¹³⁸ Some parents who are desperate for sons and who do not want to kill their unwanted daughters thus leave them in bus or train stations or outside orphanages.

133. MIHCL, *supra* note 23, art. 37.

134. See *Stop Sex Checks of Fetuses*, BEIJING REV., July 10-16, 1989, at 13.

135. At the current Chinese market rates, the initial cost of an ultrasound machine is approximately \$1,000. An owner can charge up to \$50 per scan.

136. LPWRI, *supra* note 23, art. 35.

137. In the under-staffed and poorly facilitated state-run orphanages, these babies often die young or live in poor mental and physical health. See HUMAN RIGHTS WATCH/ASIA, DEATH BY DEFAULT (1996) (comprehensive study of conditions in China's orphanages).

138. See, e.g., Anhui Family Planning Regulations, *supra* note 58, art. 24.

c. *Deprivation of "Out-of-Plan" Children*

Depriving out-of-plan children's basic care needs¹³⁹ is also a case of failed law enforcement. Such penalties prescribed in the birth policy are incompatible with stipulations in the new MIHCL. The new law pledges to provide for the basic health needs of children, promising that "[t]he state provides essential conditions and material assistance to the development of undertakings for maternal and infant health care, so that mothers and infants have access to medical and health care services."¹⁴⁰ Such legal provision is not enforced because the state's policy priority dictates punishing parents for having out-of-plan children by withholding these children's benefits and their protection under MIHCL.

d. *Medical Risks of Contraception, Abortion, and Sterilization*

Family-planning regulations require those performing abortion or sterilization to follow strict sanitary procedures in order to safeguard the health of the patient.¹⁴¹ These provisions are overlooked, however, when large numbers of abortions and sterilizations are performed hastily for the sake of meeting rigid quotas and deadlines. Particularly in poorly equipped rural clinics, doctors perform procedures on women brought in from many villages and cannot devote adequate attention to each case. Sometimes they only have time to change gloves between operations and skip other sanitary precautions. These unhygienic practices persist because only rarely are there any disciplinary consequences for those who administer the operations. After undergoing abortion or sterilization under medically unsafe conditions, women are at risk of sequelae such as pelvic infections, extravasated blood in the pelvis, and pelvic hematoma.¹⁴²

When women experience medical problems as a result of mandatory operations, doctors are allowed to inform patients of their medical conditions but cannot remove an implanted IUD upon a woman's request without permission from officials. The unauthorized removal of an IUD is punishable by administrative discipline or penalties and, in "severe cases," as a criminal offense,¹⁴³ and such offenses, due to their threat to government policy, are often swiftly punished. National legal and public security agencies issued joint

139. *Supra* Part I.C and Part II.A.1.a.

140. *See* MIHCL, *supra* note 23, art. 2.

141. *See, e.g.*, Jilin Family Planning Regulations, *supra* note 26, art. 19 (requiring that "contraceptive operations must be conducted under appropriate [safe] conditions and by qualified medical personnel . . . to ensure the safety of patients who are operated on"); *see also* Shanxi Family Planning Regulation, *supra* note 32, art. 16; Gansu Family Planning Regulations, *supra* note 34, art. 18; Hebei Family Planning Regulations, *supra* note 27, art. 21.

142. *See* CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 43-46.

143. Heilongjiang Family Planning Regulations, *supra* note 38, art. 32. This document and the Jilin Family Planning Regulations, *supra* note 26, art. 19, specifically ban "any working units or individuals" from removing the IUDs.

orders prohibiting "removing IUDs from childbearing-age women without permission" by family-planning authorities, and making it punishable by the criminal code.¹⁴⁴ None of the regulations specify who and under what conditions women can obtain legal permission to have IUDs removed. The single-ring stainless steel IUD that was widely used until recently in China¹⁴⁵ is an obsolete device, which is more likely to cause pelvic infections and abnormal, frequent menstruation.¹⁴⁶ Some women are simply unable to wear IUDs; when IUDs are installed, they may be physically expelled from their bodies.¹⁴⁷ The legal obstacles to obtaining exemptions from the requirement to remove an IUD have pushed some women to resort to unauthorized and medically risky non-clinical removals.

Some provincial regulations give women incentives to undergo certain medically risky procedures. For instance, it is considered medically unsafe for women to undergo sterilization within forty-eight hours after giving birth or right after an abortion. But sterilizations are often performed immediately following delivery or an abortion. As a reward for doing so, women in Jilin Province, for example, receive an extended paid leave from work. A fourteen-day paid leave is provided after abortion, and a thirty-day paid leave is offered if one has a sterilization at the same time; if a woman has an abortion during her second trimester, she can take thirty days off, and she can take forty days if she has a sterilization at the same time.¹⁴⁸

The cases examined in the three sections above indicate that the problem is greater and more substantial than isolated cases of individuals using violence against women and children in private spheres. The Chinese state, in pursuing its demographic goals, has failed to enforce the law and punish those who use violence against women and children, including officials carrying out governmental policies. Their conduct is, *de facto*, condoned by the state, even though official policies and legislation seem to ban some of the violent practices.

B. Policy Inconsistency: An Explanation of Governmental and Societal Failures

This section analyzes inconsistencies and conflicts between the birth control policy and the incentives created by other socio-economic policies, between various objectives of the birth-control policy itself, and the impact of such conflicts on the dynamics of policy enforcement. The question is why the protection of women's and children's rights has been hindered during the

144. Notification on Sabotaging Family Planning, *supra* note 101, at 13-14.

145. With the help of the U.N. Family Planning Agency, China has begun to replace the steel ring production with modern copper IUDs. The copper IUD, however, costs approximately 1.5 yuan to manufacture, while each steel ring IUD costs approximately 0.1 yuan.

146. See *CAUGHT BETWEEN TRADITION AND THE STATE*, *supra* note 1, at 46.

147. More than one-third of accidental, aborted pregnancies in China are reportedly attributed to IUD failure. In a study of one county the figure was 80 percent. Conly & Camp, *supra* note 3, at 36.

148. Jilin Family Planning Regulations, *supra* note 27, art. 27.

enforcement of the family-planning policy. The answer centers on conflicts and inconsistencies between laws protecting women and children and the incentives created by other government policies, such as the market-oriented agricultural policy.

1. Conflict Between the Birth Control Policy and the Rural Economic Reform Policy

In the late 1970s, the government adopted the "family responsibility system" as a major initiative in its rural economic reform. It dissolved collective farms and installed family-based economic units. Each rural family became one self-managed farm, regulated by the government through land contract, levies, and taxes, and responsible for its own earnings and profits. Under the old collective farm system, the production team collectively managed production and distribution, and members shared the burdens and benefits. The role of family in production and income-earning functions was not important. Also, under the old collective farm system, it was easier to control couples' reproductive activity because birth policy enforcement was directly tied to the allocation of benefits.

Under the new rural economic system each family largely takes care of itself. Male children accordingly become more desirable to rural parents because of their place in Chinese rural farm life. Families with male children seem to enjoy an economic advantage over households with female children. The central use of manual labor in Chinese farming appears to increase the value of male laborers. Due to the largely traditional division of labor by gender, males not only handle heavy agricultural duties, but also handle disputes (for example, over land boundaries and water allocation), often through physical fights. Females mainly take care of household chores and less physically strenuous farming jobs.

Males are also valued because they are expected to bring more laborers into the household. It is still common in rural China for a girl, upon marriage, to live with her in-laws, thus leaving her own parents short of a laborer and a helper. Couples thus deem it a "waste" to invest in their daughters' upbringing and particularly in their school education. Moreover, if a woman becomes a widow, she will most likely return to her parents' house with little to make up for the time lost while she worked for her husband's parental household.

The P.R.C. Inheritance Law and the Constitution nominally guarantee a widow's right of inheritance from her in-laws' household.¹⁴⁹ Some provincial

149. XIANFA [Constitution] art. 13 (1982) ("The state protects by law the right of citizens to inherit private property."); Zhonghua Renmin Gongheguo Jichengfa [Inheritance Law of the People's Republic of China] (1985), art. 12, (adopted Apr. 10, 1985 by the 3rd Sess. of the Sixth Nat'l People's Cong.), translated in LAW IN THE PEOPLE'S REPUBLIC OF CHINA 462, 464 (Ralph H. Folsom & John H. Minan eds., 1989) [hereinafter Inheritance Law] (stating that widowed daughter-in-law who has fulfilled obligations

family-planning regulations have prescribed some minimal incentives to induce men to move into their wives' family homes.¹⁵⁰ The power of in-laws over widows remains largely intact, however, effectively preventing a widow from inheriting her share of property in the in-laws' household. Since a widow and her husband lived with her in-laws, it would be unacceptable in the eyes of her in-laws for her to "take away" her husband's property from his parents. If she has any brothers-in-law, it is even harder for her to claim inheritance of part of her husband's family's property, since her brothers-in-law are also the legal heirs. The village authorities and local legal enforcement authorities tend not to support her legal claims to inheritance, often because of their kinship ties or local connections to the in-law families. Rural widows thus face practical obstacles to exercising their legal right to inherit from their in-laws' household.¹⁵¹

Village authorities of the widow's parents also have incentives to withhold the benefits and land to which she is entitled, so that the authorities can use the benefits and land either for their own purposes or for other villagers. When a married woman chooses not to move to her husband's village and instead remains in her parents' village, some local authorities still cancel her residential registration. They may also take away her allocated land or refuse to register her husband and children to avoid increasing the number of villagers who must share the land and resources allocated to the village.¹⁵²

The 1992 LPWRI devotes an entire chapter to women's property rights, providing that "a woman's entitlement to the land that is allocated to her for growing grain rations and for residential housing construction" remains protected after she gets married or divorced;¹⁵³ and that "[w]idowed women who performed the major obligation in providing for their father-in-law and/or mother-in-law shall be the first in line in the latter's legal heirs, and their right of inheritance is not affected by the right of inheritance of the latter's sons and daughters."¹⁵⁴

The preference for sons is heightened by the dependence of rural parents on their sons for old-age security. Rural parents tend to expect less old-age security from daughters than from sons since in most rural areas daughters are

to mother- and father-in-law is first sequence heir).

150. For example, a provision of the Guangxi Family Planning Regulations awards a couple the permission to have a second child if the husband moves to live with the wife's family, which has no son. Guangxi Family Planning Regulations, *supra* note 33, art. 10, ¶ 2.

151. For a helpful discussion of the difficulties women face under ostensibly gender neutral inheritance laws, see Jordan, *supra* note 76, at 74-76.

152. *Id.*

153. LPWRI, *supra* note 23, art. 30.

154. *Id.* art. 32. Note that Article 32 retreats from the commitments to widowed women by adding that the law protects a widow's inheritance in the household of her parents-in-law only if she was their major caretaker. The question of who was "the major caretaker" is the subject of potential protracted disputes. Since the widow is often an outsider fighting alone against her brothers- and sisters-in-law and their parents, these disputes are usually resolved to her disadvantage.

married out to live in the household of her husband and his parents.¹⁵⁵ Meanwhile, unlike urban families, rural peasants are not eligible for state-subsidized benefits including health care and retirement pensions.¹⁵⁶

Family-planning regulations have been implemented without considering the economic insecurity of rural elderly. These regulations tend to reward urban workers with an increase in retirement pension if they comply with the "one child" policy.¹⁵⁷ In this respect, family-planning regulations have widened the disparity of living standards between the urban and rural elderly. This gap further obstructs efforts to mitigate rural parents' preferences for sons.

Under the rural-urban dual system for the distribution of entitlement and duties, the current family-planning programs seem particularly insensitive to rural women's inferior status in society and their particular needs. The fact that violence against women and girls—forced abortion and sterilization, female infanticide, abandonment, and concealment of female babies—occurs primarily in rural areas can be explained by the rather limited opportunities for rural women, and the rural population in general, to obtain an education and to pursue income-earning jobs and economic independence.¹⁵⁸ Women's lack of schooling hinders them from using reproductive information, while their lack of career opportunities gives them less motivation to use contraceptives. These conditions may play a significant role in rural women's aversion to birth control policy and, consequently, in their resistance to changing reproductive practices. Their slow adaptation and resistance may explain why harsher punishment and repression have been inflicted.¹⁵⁹

By contrast, reproductive decisions by urban families (especially families of state employees) are generally less directly controlled by their basic economic needs. While seventy-five percent of urban couples may prefer two children, most seem to have settled for one. This is because, in comparison to rural couples, urban residents' economic well-being is less linked to the number and sex of their children. The socio-economic system provides for their basic needs much more adequately than it does for rural residents. Urban

155. Recent surveys show that the rural elderly rely more on their own children for old-age support than do elderly people in urban areas. In cities and villages alike, old parents with a larger number of children have more economic security than parents with fewer children. See Xia Chuanlin & Ma Fengli, *Impact of Number of Children on the Family Support for the Elderly*, 19 RENKUO YANJIU [POPULATION STUDIES] No.1, at 10-16 (1995).

156. The P.R.C. Labor Insurance Regulations only stipulated retirement pensions for workers and government staff. Zhonghua Renmin Gongheguo Laodong Baoxian Tiaoli [People's Republic of China Labor Insurance Regulations], art. 2 (Feb. 23, 1951) in ZHONGYANG LAODONG FAGUI HUIBIAN [CENTRAL COMMUNIST PARTY COMMITTEE LABOR LAW COLLECTION] 247 (1953).

157. See, e.g., Heilongjiang Family Planning, *supra* note 39, art. 26, ¶ 9. The Anhui Regulation stipulates a five percent increase of retirement pensions for state employees who have only one child. Anhui Family Planning Regulations, *supra* note 57, art 20, ¶ 6.

158. For documentation of women's unequal employment and education opportunity and a discussion of policy failures for their equal opportunity, see generally CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 62-81.

159. See Greenhalgh and Li, *supra* note 50, at 601, 609.

residents have better access to hospitals and, until very recently, they generally enjoyed heavily state-subsidized medical insurance. Finally, urban women have better educational and professional opportunities.¹⁶⁰

Birth control regulations provide better packages of compensation and rewards for urban couples who practice contraception than for rural couples. In fact, most "rewards" do not benefit rural couples at all. For example, in Anhui Province, the family planning regulation promised very few benefits for rural couples. Rewards such as extended paid leave for newlyweds who marry at least three years later than the legal marriage-age,¹⁶¹ payments for women giving birth after age twenty-four¹⁶² and for parents pledging to have only one baby¹⁶³ actually benefit only urban couples with regular salaries. Rural women who work for their own family farms or businesses only affect their family's own productivity when they take time off. No other employers or state agents pay the cost of their leave.

This urban-rural dual system, which clearly disadvantages rural populations, especially rural women, has supported the transformation of birth control measures into further restraints on rural women and girls. This dual system is at odds with the U.N. provision in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that obligates state parties to "take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families . . . and [to] take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas."¹⁶⁴

The age-old preference for sons makes economic sense in rural farming communities because, under the birth control policy, families cannot continue having children until they have the desired number of sons, and there are strong economic incentives for parents to make girls "disappear." Peasants resist a birth control policy that threatens their economic security through sex-selective abortions, concealment and abandonment of girls, and female infanticide. Still, to blame the parents alone for the resort to such extreme means is to ignore the complicity of the state in these practices. It is easy to appreciate all that is at stake when a rural couple has only girls and cannot legally have more children. It might seem worthwhile, from their point of view, to risk punishment by proceeding with "out-of-plan" pregnancies in

160. See Zhang Yibing, *Shixi Zhongguo Nuxing Xingguannian de Chenxiang Chayi* [A Preliminary Analysis on the Difference of Concept on Sex in Rural and Urban Areas] (Feb. 26, 1994) (discussing findings in surveys of rural and urban women about differences in educational opportunity and views on family, sex, and reproduction) (unpublished manuscript on file with the author); see also Conly & Camp, *supra* note 3, at 14-15 (describing significant differences between educational opportunities and literacy rates of rural and urban women).

161. Anhui Family Planning Regulations, *supra* note 57, art. 20, ¶ 1.

162. *Id.* art. 20, ¶ 2.

163. *Id.* art. 20, ¶ 4.

164. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979 [hereinafter CEDAW], art. 14, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, *reprinted in* 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

order to have sons, or even to abandon or kill female infants. The conflict between family-planning objectives and rural market pressures as well as other legal provisions effectively has made rural couples' conventional preference for sons a compelling socio-economically based necessity. Under economic pressure, they perceive the "one birth per couple" requirement to be a threat to their basic needs. Such perceived needs have motivated rural resistance to the birth policy. The social resistance, in turn, has evoked the use of state coercion since the government is determined to pursue its fertility goal. In this manner, the clashes between family planning and the desires of rural couples are intensified by clashes between family-planning policies and other government policies. These two clashes are intertwined, resulting in political and socio-economic causes of the use of force in family planning in rural areas.

2. Conflict Between Reproductive Health Objectives and the Government-Encouraged Drive for Profit

The Chinese government seems to have permitted corporate profit motives to take priority over the reproductive health of its female employees. Reproductive health care, promised women by the MIHCL¹⁶⁵ and the Regulation on Labor Protection of Female Employees,¹⁶⁶ includes the services of maternal care and maternal benefits. Increasingly, however, market-oriented companies have disincentives to hire women of childbearing age and are eager to withhold legally-required maternity leave payments.¹⁶⁷ This especially affects women during the ninety-day paid maternity leave that is mandated by the Regulation on Labor Protection of Female Employees.¹⁶⁸ During an efficiency adjustment of businesses in Anshan in the late 1980s, companies laid off many workers, eighty percent of whom were female. Fifty percent of these women were pregnant or nursing babies.¹⁶⁹ According to the same source, the maternity leave requirement has also motivated companies not to promote women to key positions or to raise their salaries.¹⁷⁰

165. See MIHCL, *supra* note 25, ch. III.

166. Nuzhigong Laodong Baohu Guiding [Regulation on Labor Protection of Female Employees] (Adopted 1988) arts. 8, 9 & 11, in FUNU HE WEICHENGNIANREN FALU BAOHU CHUAN SHU [COMPLETE BOOK OF LAWS PROTECTING WOMEN AND UNDER-AGE PERSONS], (1991) 150-51 [hereinafter Regulation on Labor Protection of Female Employees].

167. According to one estimate, the cost to a company—productivity loss plus maternity payment—for one female employee in Wuhan, a city in central China, was about 5979.94 yuan (less than \$1000) in 1987. See Song Meiya, *Daizhuo Zhengyi Zoulai di Ketu* [Controversial Topics], ZHONGGUO FUNU [CHINESE WOMEN], Feb. 1987, at 19 (discussing 1987 survey by Wuhan Municipal Women's Alliance).

168. Regulation on Labor Protection of Female Employees, *supra* note 166, art. 8. This regulation extended the period of paid maternity leave (with all benefits) from 56 days, as required by the 1950 P.R.C. Labor Protection Regulations, to 90 days. But the regulation apparently only applies to state-owned and collective enterprises, not to private, small rural collectives. *Id.* art. 2.

169. See Song Meiya, *supra* note 167, at 19.

170. *Id.*

Such discriminatory hiring and promotion practices have rarely been subjected to legal scrutiny. They have persisted despite the 1992 LPWRI's requirement that "[n]o unit is allowed to dismiss female workers or unilaterally terminate a labor contract on the grounds of marriage, pregnancy, maternity leave, or lactation."¹⁷¹ LPWRI also provides that "no discrimination against women is allowed when it comes to promoting [to] a higher position or grade and assessing special skills or duties."¹⁷² It seems that this law is not enforced rigorously because the government wants to encourage profit-maximizing businesses, the goal of the state's new economic policy.

Meanwhile, faced with reduced government spending, some cities have begun searching for innovative ways to reduce the burden on businesses of paying for employees' maternity leaves. In August 1988, the city of Nantong in Jiangsu Province set up a "Women Employee Reproduction Fund" by collecting an annual fee of twenty yuan (about \$2.50) from each employee in the city's state-owned or large collective companies.¹⁷³ This fund was to be used to pay for the salary and benefits of employees on maternity leave. The city of Anshan, Liaoning Province, passed a law in 1988 mandating that maternity benefits be paid by both the husband's and the wife's companies, instead of by the wife's alone. And Zhuzhou, Hunan Province, requires women to take maternity leave for four years, during which time they cannot return to work and their companies pay 100% of their salary for ninety days. For the rest of their leave, they are paid 70% by a municipal Birth Fund, which is funded by a 5% tax taken from the annual salary of all employees.¹⁷⁴

These policy experiments aim to appease companies by taking on some of their financial responsibilities. Some of these policies, however, adversely affect the interests of pregnant women and mothers nursing babies. In the above case of Zhuzhou, where women are required to take a four-year maternity leave, those women who want to return to work sooner and earn their full salaries do not have that option. Experimental policies also confront implementation difficulties in the collection of funds. Nantong's "Women Employee Reproduction Fund," for example, has failed to collect the mandated fee from companies.¹⁷⁵ Similarly, in Anshan, the husband's company and the wife's company have often refused to pay their respective shares.¹⁷⁶

How the state and the law can best protect women in fulfilling their dual roles of childbearing and equal participation in the workplace is a complex issue. As a developing country, China cannot be expected to have found the perfect solution. The question here is whether the government is willing to succumb to a dominant societal interest—the business interest in this case—and

171. LPWRI, *supra* note 24, art. 26.

172. *Id.* art. 24.

173. Meiya, *supra* note 167, at 19.

174. *Id.*

175. *Id.* at 19-20.

176. *Id.*

allow the drive for profit to override women's legal rights and legitimate interests.

3. *The Government's Unwillingness to Allocate the Necessary Funding*

While the government has made family planning a national priority and has mobilized the administrative and legal instruments necessary to enforce birth quotas, it has not secured funding for reproductive health programs. The lack of funding for such programs has been at least partially responsible for limiting women's choices and creating unsafe reproductive and contraceptive practices.

The range of contraceptive methods offered to couples is quite limited. One study found that among Chinese couples using birth control, sterilization was the method used by 48% of women and men, while IUDs were used by 41% of women.¹⁷⁷ To date, the state has allocated very limited funds to pay for rural family-planning workers and their training.¹⁷⁸ This underfunding not only leads to ill-prepared workers, but also makes the job financially unattractive to qualified professionals. The result of these factors is inadequate family-planning services. In addition, the often under-staffed "family-planning working teams" may be given responsibility for more villages than they can handle effectively. As a result, villages might receive visits from family-planning workers only once or twice a year. During such visits, family-planning and health workers, often assisted by local authorities and police, shepherd fertile women into temporary clinics or town hospitals in order to perform abortions and sterilizations and install IUDs.¹⁷⁹ The women receive little follow-up attention to detect side effects or infection. Given the absence of reproductive health workers, village women can have a hard time finding health advice when they need it. If they develop medical complications when family-planning workers and doctors are unavailable, they either must travel long distances to clinics located in town centers or cities, or wait for the next visit by health workers.

In its reports to the U.N. Committee on the Elimination of Discrimination Against Women,¹⁸⁰ the government of China reiterated that its family-planning policy aims at improving women's reproductive health. If the government were genuinely committed to this objective it would be doing much more to mitigate the adverse health consequences of poor quality services and

177. See Conly & Camp, *supra* note 3, at 30. In comparison, 5.4% used the Pill, 3.8% used condoms, 0.8% used spermicide, and 0.7% used other methods. *Id.*

178. The government currently spends about 100 million yuan (a little more than \$10 million) each year on family-planning programs, which is about one yuan (or \$0.8) per capita. *Population vs. Development*, *supra* note 2, at 15.

179. See CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 39-41.

180. *Initial Reports of States Parties: People's Republic of China*, Committee on the Elimination of Discrimination Against Women, 2d Sess., U.N. Doc. CEDAW/C/5/Add.14 (1983); *Second Periodic Reports of States Parties: People's Republic of China*, Committee on the Elimination of Discrimination Against Women, 11th Sess., U.N. Doc. CEDAW/C/13/Add.26 (1989).

inadequate staffing in the family-planning networks. In particular, more funding needs to be allocated to reproductive health services and educational programs for women and training projects for family-planning workers.¹⁸¹ The government also needs to increase salaries of doctors on its payroll if it is to attract qualified professionals. The government also could contract reproductive health services to privatized regional hospitals. Because China's GNP has been growing at an average annual rate of 12.2% from 1991 to 1994,¹⁸² and international family-planning agencies have provided aid,¹⁸³ the necessary funds should not be too difficult to locate. A continued failure to secure resources for adequate reproductive services suggests a governmental lack of will to make the health care of women and children a priority, despite the commitment that it made to do so when it adopted the CEDAW, LPWRI and MIHCL.

III. CHINA'S OBLIGATION TO THE U.N. TO IMPLEMENT REPRODUCTIVE RIGHTS AND THE RIGHTS OF WOMEN AND CHILDREN

A. *The Binding Force of China's U.N. Obligations*

One way to assess China's efforts to protect the human rights of women and children in its family-planning program is to measure them against international human rights standards, both specific international covenants that China has pledged to uphold and more general principles of international law.

As a member state of the U.N., China is obligated to comply with the United Nations Charter and the Universal Declaration of Human Rights (UDHR),¹⁸⁴ which set minimum conditions for membership. Though the People's Republic of China was not among the original signatories to the UDHR¹⁸⁵ or the U.N. Charter, it should be bound by them as long as it remains a member of the U.N. The Charter seeks to promote and encourage "respect for human rights and for fundamental freedoms for all without

181. Funding for this purpose could be secured, for example, by taxing businesses. This tax can be justified on the grounds that raising the quality of reproductive care and developing a sustainable population program is in the interest of all members of society.

182. 1995 WHITE PAPER, *supra* note 63, at 13.

183. The Chinese government has acknowledged that the "United Nations has, during the past thirteen years, provided valuable assistance to the population and family planning program in China. . . . They have given an impetus to the enhancement of the demographic research capacity and to the continuous improvement in the population and family planning program." P.R.C. Report to Cairo Conference on Population and Development, *supra* note 26, at 56.

184. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d. Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

185. The Republic of China signed the UDHR in 1948. The People's Republic of China then declared that the Republic of China's "signature and ratification of, or accession to, any multilateral treaties by usurping the name of 'China' are all illegal and null and void." CENTRE FOR HUMAN RIGHTS, STATUS OF INTERNATIONAL INSTRUMENTS at 20 n.2, U.N. Doc. ST/HR/5, U.N. Sales No. E.87.XIV.2 (1987).

distinction as to race, sex, language, or religion,"¹⁸⁶ and "[to] be a centre for harmonizing the actions of nations in the attainment of these common ends."¹⁸⁷ The UDHR is billed as "a common standard of achievement for all peoples and all nations."¹⁸⁸ China has recently endorsed this document.¹⁸⁹ At the Cairo International Conference on Population and Development in 1994, China, together with other participating countries, affirmed that all people are entitled to all the rights and freedoms set forth in the UDHR, stressing that "[h]uman beings are at the center of concerns for sustainable development People are the most important and valuable resource of any nation [and] the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."¹⁹⁰

Though China has not become a party to the International Covenant on Civil and Political Rights,¹⁹¹ and the International Covenant on Economic, Social and Cultural Rights,¹⁹² it has signed and ratified a number of other U.N. instruments concerning special areas of human rights.¹⁹³ Notably, China has signed the CEDAW¹⁹⁴ and the Convention on the Rights of the Child (Children's Convention).¹⁹⁵ Thus China ostensibly has undertaken the duties of compliance which these instruments set forth. For example, China must report on its progress to the U.N. Committee on the Elimination of Discrimination Against Women within one year of ratification and every four years thereafter, evaluating its own level of compliance, reporting the

186. U.N. CHARTER, art. 1, ¶ 3.

187. *Id.* art. 1, ¶ 4.

188. UDHR, *supra* note 184, Preamble.

189. In his September, 1988 speech to the 43d Session of the United Nations General Assembly, the Chinese Foreign Minister stated that the "Universal Declaration of Human Rights [is] the first international instrument which systematically sets forth the specific contents regarding respect for and protection of fundamental human rights." 1991 WHITE PAPER, *supra* note 19, at 43.

190. Report of the International Conference on Population and Development, *supra* note 20, at 14.

191. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368.

192. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

193. These include the Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, the International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243, the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, the Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51 at 197, *reprinted in* 23 I.L.M. 1027, *as modified*, 24 I.L.M. 535 (1985). See 1991 WHITE PAPER, *supra* note 19, at 43-44.

194. The P.R.C. National People's Congress ratified CEDAW in September 1980. See CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 93.

195. Children's Convention, *supra* note 67. The Chinese government signed the Convention on the Rights of the Child on August 29, 1990 and presented the ratification instrument to the United Nations on March 2, 1992. *Envoy Ratifies Child Rights Convention*, BEIJING XINHUA, Mar. 2, 1992, *reprinted in* FBIS-CHI-92-042, Mar. 3, 1992, at 1. For discussion of China's substantive obligations under the Convention on the Rights of the Child, see *infra* notes 221-30 and accompanying text.

legislative and judicial steps taken in order to comply, and explaining difficulties preventing satisfactory compliance with the convention.¹⁹⁶

U.N. human rights norms, however, do not operate as binding law. Though the existence of these norms facilitates the assessment and criticism of member states' practices, the breach of these norms does not command legal sanctions. For example, the documents drawn up at the 1994 Cairo Population Conference¹⁹⁷ and the 1995 Beijing Women's Conference,¹⁹⁸ have virtually no legally binding effect,¹⁹⁹ though such documents could set standards to help pressure governments to reform laws and practices which involve discrimination and violence against women. Because no sanctions attached, member states' obligations under the U.N. Charter and UDHR embody only aspirational norms in that they are pledges by member states to reform their current institutions and legal practices in order to work toward a future of greater respect for these rights. It also means that these states should be accountable to the U.N. community for their breach of such norms: they must explain what violations exist and why.

At least an explanation is due which would then be subjected to scrutiny by panels of experts, such as the U.N. Committee on the Elimination of Discrimination Against Women, with relative independence from the political dealings at the U.N. Member states must reply to and address the concerns and doubts raised by these panels.

Such rudimentary accountability gives meaning to the applicability of international rights conventions to state parties. The Chinese government's recognition of international rights conventions signals that the government no longer openly denies the validity of the norms set forth in these conventions. Rather, the government now argues that it has behaved according to conventional norms. In other words, the Chinese government has entered a dialogue—open to the scrutiny of the international community—about what constitutes compliance and violation. Such engagement is a marked step forward from the prior policy of outright rejection of human rights.

196. CEDAW, *supra* note 164, art. 18, ¶¶ 1, 2. China has submitted two reports, one in 1983 and one in 1989. *Initial Reports of States Parties: People's Republic of China*, *supra* note 180; *Second Reports of States Parties: People's Republic of China*, *supra* note 180.

197. See *Report of the International Conference on Population and Development*, *supra* note 20.

198. The main document is the *Beijing Declaration and Platform for Action: Report of the Fourth World Conference on Women*, at 4-132, U.N. Doc. A/CONF.177/20 (1995). [hereinafter *Beijing Platform for Action*].

199. For example, after the U.N. Fourth World Conference on Women resolved in a consensus "Platform for Action" that governments should not use coercive laws to control women's ability to choose the number of children they have, China announced that it would stick to its strict birth control policy anyway. Steven Mufson, *U.N. Women's Meeting Settles Key Disputes*, WASH. POST, Sept. 14, 1995, at A15. Chinese Foreign Ministry spokesman Chen Jian noted in this vein that U.N. documents "are only recommendations and are not legally binding." *Id.*

B. Relevant U.N. Human Rights Instruments

In this section, I discuss the rights violations that have persisted as part of China's campaign to control population in light of international human rights norms. The discussion covers three related areas: reproductive rights, women's rights, and the rights of children.

1. *The International Conventions on Reproductive Freedom*

According to international norms, reproductive rights as basic human rights are both "positive" and "negative" rights; they include both rights to be provided with certain resources or services and rights not to suffer interference with certain actions.²⁰⁰ Women's negative reproductive rights include the right to freedom from state interference in their decisions about the number, timing and spacing of births. This freedom was affirmed by the Teheran Declaration adopted at the 1968 U.N. Human Rights Conference.²⁰¹ Women's positive reproductive rights include the right to state-provided reproductive health services and access to reproductive health information. The understanding of reproductive rights was expanded to include this positive freedom at the 1978 International Conference on Health Care.²⁰² Both the negative and positive components of reproductive rights were affirmed in CEDAW.²⁰³ Article 16 of CEDAW states:

State Parties shall take all appropriate measures to . . . ensure, on a basis of equality of men and women . . . the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights²⁰⁴

Under the Chinese policy, however, women clearly do not have the negative freedom to make reproductive choices regarding the number and timing of births. The Chinese government's violations of women's positive

200. See THOMAS NAGEL, *Equality*, in MORTAL QUESTIONS 106, 114-15 (1979) (discussing distinction between positive and negative rights); see also MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? (1973). But see HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 35-64 (1980) (critiquing distinction).

201. Declaration of Teheran, U.N. GAOR, 23rd Sess., Supp. No. 41, U.N. Doc. A/CONF.32/41 (1968). The right has been affirmed in the Declaration on Social Progress and Development, G.A. Res. 2542, U.N. GAOR, 24th Sess., U.N. Doc. A/7630 (1960); the *World Population Plan of Action of Bucharest*, United Nations World Population Conference, U.N. Doc. E/CONF.60/19 (1974); the *Report of the World Conference of the International Women's Year* at 5, U.N. Doc. E/CONF.66/34, U.N. Sales. No. E.76.IV.1 (1976); and the *Beijing Platform for Action*, *supra* note 198.

202. WORLD HEALTH ORGANIZATION & UNITED NATIONS CHILDREN'S FUND, *Primary Health Care: Report of the International Conference on Primary Health Care 2* (1978) (discussing reproductive health care as essential component of a country's health care system).

203. CEDAW, *supra* note 164, art. 16, ¶ 1.

204. *Id.*

rights under CEDAW are only slightly less obvious. A positive right to obtain reproductive services implies that couples can choose freely from a range of available services and contraception methods. China provides a fixed means of contraception and enforces its use. China's family-planning program claims to provide reproductive services and access to information.²⁰⁵ In fact, it restricts women's reproductive choices through its compulsory birth control measures.²⁰⁶ There are also problems with the quality of reproductive counseling and services, especially in rural areas, and problems with government failure to secure sufficient funding for adequate quality care. Many family-planning personnel are poorly trained and lack the knowledge necessary to advise couples fully on the risks and benefits of different contraceptive methods.

Article 16 of the CEDAW stipulates that individuals' voluntary cooperation with a state's family-planning policies and their reproductive autonomy are essential to reproductive rights.²⁰⁷ However, some might argue that Section 16's phrase "freely and responsibly" implicitly condones efforts by the state to enforce "responsible" reproduction by couples, that is, reproduction that is "responsible" toward society and the public interest.²⁰⁸ This concern may not be completely unfounded, but, in balancing personal "responsibility" and "freedom," the CEDAW in no way authorizes the state to use compulsory means to enforce "responsibility."

2. International Conventions on Eliminating Discrimination and Violence against Women

Women's rights have been affirmed repeatedly by major U.N. human rights instruments. Both the U.N. Charter and the Universal Declaration of Human Rights (UDHR) reaffirmed the equal rights of men and women.²⁰⁹ The elimination of discrimination and violence against women was the focus of the 1993 World Conference on Human Rights and its Declaration on the Elimination of Violence Against Women (DEVAW).²¹⁰ CEDAW requires state parties to take "all appropriate measures" to ensure "the practical realization" of equality,²¹¹ the elimination of discrimination, and "the full advancement and development of women."²¹² DEVAW recognized violence against women as a violation of human rights. DEVAW defined "violence

205. The official claim is that 75% of couples of child-bearing age in China currently have access to family-planning methods. *Population vs. Development*, *supra* note 2, at 12.

206. *See supra* Part II.B.

207. CEDAW, *supra* note 164, art. 16, ¶ 1.

208. *Id.*

209. *See* U.N. CHARTER, art. 13, ¶ b; UDHR, *supra* note 184, Preamble.

210. *Declaration on the Elimination of Violence Against Women*, G.A. Res. 104, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/104 (1993), *reprinted in* 33 I.L.M. 1049 [hereinafter DEVAW].

211. CEDAW, *supra* note 164, arts. 1-2, 4-5.

212. *Id.* art. 3.

against women” as “act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women.”²¹³ It requires states to pursue by all appropriate means and without delay a policy of eliminating violence against women.²¹⁴ DEVAW required further that states take proactive measures to change social practices, as opposed to simply blaming “custom, tradition or religious consideration” for the persistence of social violence against women.²¹⁵

More recently, member states of the U.N., recognizing that women’s rights are human rights, articulated the obligation to eliminate violence against women in relation to population and development projects:

Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women’s ability to control their own fertility, are cornerstones of population and development related programmes. The human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights.²¹⁶

China’s family-planning policy and its implementation of that policy clash with these articulations of the rights of women and female children. The government has not lived up to its obligations as a state party under CEDAW, particularly with regard to its obligation “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”²¹⁷

3. *International Convention on the Rights of the Child*

Finally, international conventions with a focus on protecting children’s rights provide another yardstick for measuring China’s population control programs. The rights of children to special safeguards and care were recognized in the Universal Declaration on Human Rights,²¹⁸ the International Covenant on Social, Economic, and Cultural Rights,²¹⁹ the International Covenant on Civil and Political Rights,²²⁰ and the U.N.

213. DEVAW, *supra* note 210, art. 1.

214. *Id.* art. 4.

215. *Id.* art. 4.

216. *Report of the International Conference on Population and Development*, *supra* note 20, at 15.

217. CEDAW, *supra* note 164, art. 5.

218. UDHR, *supra* note 184, art. 25 (“Motherhood and childhood are entitled to special care and assistance.”).

219. International Covenant on Economic, Social and Cultural Rights, *supra* note 192, art. 10.

220. International Covenant on Civil and Political Rights, *supra* note 191, art. 23 ¶ 4, art. 24.

Convention on the Rights of the Child.²²¹ China thus has agreed to "respect and ensure"²²² the rights of children and to "undertake all appropriate legislative, administrative, and other measures for the implementation" of the rights of each child within its jurisdiction, as set forth in the Children's Convention.²²³

Particularly relevant to our assessment of China's family-planning programs are the Children's Convention's protections of all children's "inherent right to life,"²²⁴ the right "to be registered immediately after birth [and] the right to acquire a nationality,"²²⁵ the right "to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health,"²²⁶ the right "to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,"²²⁷ and, finally, the right "to education."²²⁸

Contrary to its official endorsement of these rights, however, China has systematically breached them in its campaign to control population. The government-authorized ban on out-of-plan children, and the lack of enforcement of penalties against cruel and abusive treatment of female children,²²⁹ violate the rights of children enshrined in Articles 6, 7, 24, 27, and 28 of the Children's Convention. The punishment of out-of-plan children is also a breach of Article 2, which specifically urges states parties to "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."²³⁰ Yet, when Chinese parents fail to observe the population quota or take mandatory contraceptives, their children are punished.

C. China's Responses to the Probing of the United Nations

Responses to the U.N. from China have included flawed or one-sided accounts.²³¹ Moreover, China's reaction to criticism of its overall human rights record appeals to culturally-specific interpretations of international norms. For example, in two official "White Papers" on human rights, the Chinese government, contradicting its statement endorsing the UDHR, has insisted that it is entitled to its own understanding of human rights. China's

221. Children's Convention, *supra* note 67.

222. *Id.* art. 2.

223. *Id.* art. 4.

224. *Id.* art. 6.

225. *Id.* art. 7.

226. *Id.* art. 24.

227. *Id.* art. 27.

228. *Id.* art. 28.

229. *See supra* Part II.

230. Children's Convention, *supra* note 67, art. 2.

231. For a critical analysis of China's reports to the U.N., see CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 93-102.

understanding of human rights, the government explained, emphasizes the right to subsistence and development, the evaluation of collective versus individual rights, the primacy of national sovereignty, and the concept of international rights as interventionist in internal affairs.²³²

In response to criticisms of this nature, the government has also tried to defend its record. One official statement asserted that "[s]trong measures have been adopted against unlawful cruel treatment of women."²³³ This statement, however, does not mention practices such as forced abortion and sterilization. As a signatory to the CEDAW, China is obligated to report to the U.N. on its progress and failures in taking measures against discrimination and violence against women. However, in its reports thus far, China has not given adequate and full accounts of the gaps in its implementation of the CEDAW. In the two reports made to the U.N. Committee on the Elimination of Discrimination Against Women,²³⁴ China listed legislation related to equality and the elimination of discrimination against women, such as the 1982 Constitution,²³⁵ the Marriage Law,²³⁶ the Inheritance Law,²³⁷ and some provisions on prostitution in the Criminal Law.²³⁸ These reports, however, discuss minimally how the objectives set by the laws are to be implemented or what measures have been taken to give effect to these laws.²³⁹ The reports generally blamed traditional biases as the main obstacle to women's equal treatment.

In the second report to the CEDAW Committee, some details were offered to demonstrate China's efforts to ensure women's access to health care services, including reproductive health care and family planning. The details, however, focused on the number of family-planning workers, gynecologists and hospitals. The report did not address the issue of discrimination and violence against women and female children associated with the family-planning policy and its implementation. When questioned about the level of violence against women in China by experts on the U.N. Committee on the Elimination of Discrimination Against Women, China's representatives replied elusively that "violence against women had not been a serious social problem in China."²⁴⁰

With respect to children's rights, as a result of signing the Children's Convention, the Chinese government is similarly obligated to respond to U.N. cross-examinations. The government's responses to questions from a U.N.

232. See 1991 WHITE PAPER, *supra* note 19; 1995 WHITE PAPER, *supra* note 63.

233. *The Situation of Chinese Women*, BEIJING REVIEW, June 6-12, 1994, at 20.

234. *Initial Reports of States Parties: People's Republic of China*, *supra* note 180; *Second Periodic Reports of States Parties: People's Republic of China*, *supra* note 180.

235. XIANFA [Constitution] (1982).

236. Marriage Law, *supra* note 12.

237. Inheritance Law, *supra* note 149.

238. Criminal Law, *supra* note 109.

239. CAUGHT BETWEEN TRADITION AND THE STATE, *supra* note 1, at 93-102.

240. *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Committee on the Elimination of Discrimination Against Women, 47th Sess., at 47, ¶ 171, U.N. Doc. A/47/38 (1992).

special committee on the rights of the child are expected to be submitted in summer 1996.

IV. CONCLUSION: POLICY ALTERNATIVES

In order to respect the rights of women and children while pursuing its family-planning programs, the Chinese government must take concrete steps to counter the underlying pressures on families to have male children and the social violence against women and baby girls. Policy alternatives to the ones that have been in practice may include the following proposals.

A. *Shifts in Policy Emphasis*

In order to comply with international norms of reproductive rights, the emphasis of Chinese family-planning programs should shift from rigid demographic objectives (such as the fixed birth quota and fertility rate) to improving the quality of reproductive health care, expanding couples' reproductive choices, and enhancing counseling services. As some health and development experts and demographers have come to agree, programs designed to succeed in meeting these objectives will be more effective in reducing the size of the population.²⁴¹ Such programs focus on providing a wider range of choice of contraceptive methods, instead of forcing couples to rely on a small range of methods—such as IUDs for a woman after her first birth, and abortion or sterilization after the second birth—which increase women's health risks and medical complications. Government spending on family planning should accordingly shift toward better education and counseling programs. For example, to ensure female student enrollment in schools, especially in poor rural areas, the government could give parents tax incentives for sending their daughters to school and grant girls from poor rural families need-based financial aid or increase the amount of such aid if similar programs are already in place.

This shift in policy emphasis may result in a short-term spurt in the fertility rate. But over the long term such programs will empower women to make informed choices and stabilize reduced family size, a trend that has been observed in major Chinese cities where the rate of literacy (and women's literacy in particular) is higher and reproductive information more accessible.²⁴²

241. See, e.g., Conly & Camp, *supra* note 3, at 40-41.

242. Since the late 1980s, the average number of births per woman has stabilized at 1.47 in Shanghai, 1.55 in Beijing, and 1.8 in Tianjin. *Id.* at 11. According to one researcher, data from the 1988 national population control study suggested that illiterate women between the ages of 45 and 49 had on average 4.1 children, while women in the same age group with more education had 2.14 children. Tan Lin, *On the Impact of Female Education on Marriage and Reproduction*, 4 RENKOU YU JINJI [POPULATION & ECONOMICS] 49 (1993).

In accordance with this shift of policy objectives, certain enforcement measures will have to be abandoned, such as penalties that punish children and deprive them of the opportunity for healthy early-childhood development. The government must act to repeal policy measures that implicitly tolerate, condone, or perpetuate infanticide, abandonment, abuse, and neglect of female children. For example, the government could sponsor investigations or allow independent investigations by international monitoring organizations (such as the United Nations Family Planning Agency) of the "missing girls," make special efforts to register "hidden" girls, grant them legal status, and ensure their entitlement to state subsidies. The government also should allow scientists and health experts to debate eugenics policy openly, facilitate education-oriented programs that aim at training policy-makers and health officials, and popularize scientific understanding of the genetic basis of hereditary diseases. Furthermore, the legal provision requiring that the disabled or their families must voluntarily agree to sterilization should be strictly respected by enforcement officials.

B. Legislative and Judicial Reforms

Existing laws protecting the health, sexual, and reproductive rights of women (especially the LPWRI) and laws protecting the rights of children (the MIHCL) should be amended with concrete and credible implementation procedures. The legal/judicial system should have the power, independent of that of governmental authorities, to enforce the LPWRI, the MIHCL, the Criminal Law and administrative laws, in order to penalize governmental officials who use force illegally to achieve government family-planning objectives.

The Chinese government must pass concrete penalties to enable the LPWRI and MIHCL to protect women and female children from discrimination and violence. Moreover, the government must alter current law enforcement practice, which punishes leniently (if at all) family members who abuse their children. Finally, because children who have been abused, injured or killed cannot file complaints, the state should act as prosecutor instead of insisting that the victims (or their parents or guardians) file lawsuits, as is currently the case. With respect to members outside the children's family, family-planning officials, doctors and nurses should be strictly prohibited from killing or authorizing the killing of babies born alive after induced labor. Such crimes should be prosecuted as homicide in accordance with the criminal code. Moreover, specific penalties for such crimes, or reference to the relevant criminal statutes, should be incorporated into the LPWRI. The prohibitions and prosecutions should be publicized in order to educate both governmental officials and ordinary citizens that the criminal justice system treats the use of violence against women and children as punishable crimes.

In the long run, legal reforms are necessary to bringing China's fertility policies into conformity with its international obligations to protect the rights of women and children, as well as with its domestic laws. Granting autonomy to the legislative and judicial bodies, as one major component of legal reform, would help reduce arbitrariness in policy making.

C. Toward Policy Cohesion and Broader Social Reforms

The conflict between the rural "family responsibility" economic policy and the birth control policy can be resolved by taking concrete measures to provide economic security for the rural poor. Such measures would include:

(1) Giving tax incentives to men who "married into" their spouse's parental homes or home villages. Also, expanding the opportunities for rural young women to receive professional training and income-earning jobs will help them to reach parity with young males in their ability to provide for their families and assist aging parents.

(2) Giving family farms and small businesses economic incentives (such as business tax breaks or reduced levies) for employing non-family-member laborers. Rural families would then become less dependent on their own male children for heavy-duty tasks.

(3) Reforming the current social security and retirement pension systems to respond to the needs of a vast rural population at a time of increasing privatization. The new system should reduce favoritism toward state-employed urban residents. Furthermore, financial security for rural elders will help to reduce the economic incentives to prefer sons. Experiments conducted in some cities with insurance and saving plans for families without sons or with only one child are instructive. Special efforts must be made to address the issue of old-age security at the national level and to bring the rural poor into a sound social security system.

To conclude, the Chinese government's policies, as well as its legal system failures, are the major culprits behind the use of violence and discrimination against women, children, and particularly baby girls in the implementation of family-planning campaigns. State policies encourage such violations. Where government legislation for the protection of women and children exists, there are few concrete or credible enforcement measures attached. The state picks and chooses among its laws, enforcing only those laws that promote its political objectives while neglecting to enforce other laws. Moreover, while the government blames cultural tradition for violence against women and female children, its own inconsistency and the conflicts between population policy and other social-economic policies tend to enhance social prejudices against women and promote subjugation of the female sex and violence against women. Economically-motivated social resistance to family planning reinforces state coercion and further intensifies violence. Though they have limited

binding force, international human rights norms provide the proper measuring device for assessing Chinese population policy and practices. While the government fails to live up to its international obligations, it has, nevertheless, engaged in a dialogue by attempting to defend its record to the international community. But to live up to its claim as the “liberator” of women, the guardian of children, and the champion of social-economic rights and harmony between society and family, the Chinese government must make major political and legal reforms.

